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IN THE

# Supreme Court of the United States

October Term, 1957

No. 1010

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation of the State of New Jersey, THE PENNSYLVANIA RAILROAD COMPANY, a corporation of the Commonwealth of Pennsylvania; LEHIGH VALLEY RAILROAD COMPANY, a corporation of the Commonwealth of Pennsylvania; THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a corporation of the Commonwealth of Pennsylvania, and ERIE RAILROAD COMPANY, a corporation of the State of New York,

*Petitioners,*

*vs.*

AARON K. NEELD, Director, Division of Taxation in the Department of the Treasury, State of New Jersey, and CITY OF JERSEY CITY, CITY OF HOBOKEN, CITY OF CAMDEN, TOWN OF SECAUCUS, CITY OF NEWARK and TOWNSHIP OF WEEHAWKEN, all municipal corporations of the State of New Jersey,

*Respondents.*

# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Jersey City, New Jersey

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

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No.

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THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation of the State of New Jersey, THE PENNSYLVANIA RAILROAD COMPANY, a corporation of the Commonwealth of Pennsylvania; LEHIGH VALLEY RAILROAD COMPANY, a corporation of the Commonwealth of Pennsylvania; THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a corporation of the Commonwealth of Pennsylvania, and ERIE RAILROAD COMPANY, a corporation of the State of New York,

*Petitioners,*

*vs.*

AARON K. NEELD, Director, Division of Taxation in the Department of the Treasury, State of New Jersey, and CITY OF JERSEY CITY, CITY OF HOBOKEN, CITY OF CAMDEN, TOWN OF SECAUCUS, CITY OF NEWARK, and TOWNSHIP OF WEEHAWKEN, all municipal corporations of the State of New Jersey,

*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioners' Central,* Pennsylvania, Lehigh, Lackawanna and Erie pray that a writ of *certiorari* issue to review the judgments of the Supreme Court of New Jersey entered in the above entitled cases on February 17, 1958.

## Opinions Below

The opinion of the Supreme Court of New Jersey in the above entitled matter is reported in *26 N. J. 172, 139 Atl.* 2nd 110 and is printed as Appendix A annexed hereto. (p. 1a to 18a)

The opinion of the trial court denying the respondents' motions to dismiss the complaints is unreported and is printed as Appendix C annexed hereto. (p. 21a)

The findings and conclusions of the Director are printed as Appendix D annexed hereto. (p. 22a to 26a)

The opinion of the Supreme Court of New Jersey in the companion case of *Central Railroad Company* v. *Neeld* is reported in 26 N. J. 188, 139 Atl. 2nd 119 and is printed as Appendix E annexed hereto (p. 27a to 37a)

## Jurisdiction

The judgment of the Supreme Court of New Jersey was dated and entered on February 17, 1958 (Appendix B, p. 19a to 20a). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3).

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* Throughout this Petition we will refer to The Central Railroad Company of New Jersey as "Central"; The Pennsylvania Railroad Company as "Pennsylvania"; Lehigh Valley Railroad Company as "Lehigh"; The Delaware, Lackawanna and Western Railroad Company as "Lackawanna"; Erie Railroad Company as "Erie"; Superior Court of New Jersey as "Superior Court"; Director, Division of Taxation as "Director"; City of Jersey City as "Jersey City"; City of Hoboken as "Hoboken"; City of Camden as "Camden"; Town of Secaucus as "Secaucus"; City of Newark as "Newark"; Township of Weehawken as "Weehawken" and Division of Tax Appeals as "Division".

## Questions Presented

1. Is a taxpayer against whose property a patently discriminatory assessment is assessed and levied denied equal protection of the laws and deprived of its property without due process of law under the Constitution of the United States:

A. By a judgment of a State court dismissing taxpayer's complaint whereby taxpayer sought to have the patently discriminatory assessment and tax nullified and the matter remanded to the assessor for a proper initial assessment and tax.

B. By a judgment of a State court dismissing taxpayer's complaint whereby it sought to have the patently discriminatory assessment and tax nullified and the matter remanded to the assessor for a proper initial assessment and tax and relegated taxpayer to its remedy before the State Tax Administrative Tribunal where taxpayer will have the burden of proving that the assessment is discriminatory under a standard of proof that is impossible to meet; and

(1) Where taxpayer* has had pending before said State Tax Administrative Tribunal complaints for taxes assessed and levied for all years from 1953 to 1956 inclusive without having had a hearing on any of said complaints and without any reasonable prospect of taxpayers obtaining a hearing on said complaints in the foreseeable future; and

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* The statement in sub-paragraph (1) does not apply to Pennsylvania because its cases for the years 1953 to 1956 inclusive have been in the process of being tried before the State Tax Administrative Tribunal from November, 1954 to date and are not yet completed.

(2) Where, under the State law, taxpayer is required to pay the patently discriminatory tax in full or run the risk of having to pay a penalty of 1% per month on any unpaid portion of said tax ultimately determined to be legally due, whereas taxpayer, if it overpays its tax, is not entitled to any interest on the amount so overpaid or to refund of said overpayment except as a credit against future taxes.

## Constitution and Statutes Involved

The State constitutional provision involved is Article VIII, Sec. 1, Par. 1 of the Constitution of New Jersey, 1947, which provides as follows:

> "Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value; and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district."

The statutory provisions involved are various sections of the New Jersey Railroad Tax Law of 1948 (N.J.S.A. 54:29A-6, etc.). These statutory provisions are printed as Appendix N annexed hereto. (p. 188a to 198a) Two provisions of the New Jersey statutes regulating the assessments against locally assessable real property (N.J.S.A. 54:4-1 and 23). These statutory provisions are printed as Appendix O annexed hereto. (p. 199a to 200a)

## Statement of the Case

Each of the petitioners owns and operates an interstate railroad with extensive terminal properties in the State of New Jersey. The controversy presented by this petition relates to unconstitutional discrimination between the assessments levied by the Director for the tax year 1957 against petitioners' Class II properties and assessments levied against locally assessable properties by the taxing districts in which said terminal properties of petitioners are located.[1]

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[1] Under the New Jersey Railroad Tax Law of 1948 (N.J.S.A. 54:29A-1, *et seq.* the relevant portions of which are set forth in Appendix N annexed hereto), all properties used for railroad purposes in New Jersey are taxable annually by Director (a State official). N.J.S.A. 54:29A-17 requires Director, on or before November 1st of each year to determine the true value as of the preceding January 1st of all property used for railroad purposes in New Jersey according to three classifications, namely Class I (Main Stem) which is defined as the roadbed not exceeding 100 feet in width; Class II which is defined as all other real estate used for railroad purposes in each taxing district of the State and Class III, all tangible personal property. N.J.S.A. 54:29A-24 provides that the entire amount of tax receipt derived from assessment of Class II properties shall be allotted and paid to the local taxing district in which such property is located.

Under the general tax laws of New Jersey (54:4-1), the text of which is set forth in Appendix O annexed hereto, all property real and personal within the jurisdiction of New Jersey, except those properties expressly excluded from the operation of said chapter, is subject to taxation annually at its true value and is required to be valued by the local assessors (municipal officials) of the respective taxing districts. N.J.S.A. 54:4-23 (the full text of which is set forth in Appendix O annexed hereto), provides that each local assessor shall determine the full and fair value of each parcel of real property situated in the taxing district at such price as, in his judg-

*(Continued on following page)*

It has been acknowledged for a number of years that locally assessed properties in the State of New Jersey have not been assessed at true value.[2]

Petitioners have for a number of years taken the position before Director that he, in levying assessments against them at full true value, while locally assessed properties in the various taxing districts concerned were assessed at standards of value considerably below true value, was intentionally and systematically discriminating against petitioners in violation of their rights under the Constitution of the United States.[3]

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*(Continued from preceding page)*

ment, it would sell for at a fair and *bona fide* sale by private contract on October 1st next preceding the date on which the assessor shall complete his assessments.

The Constitution of New Jersey (1947) Article VIII, Sec. 1, Par. 1, quoted *supra* requires that all real property assessed and taxed locally or by the State for allotment and payment to taxing districts is required to be assessed according to the same standard of value and taxed at the general tax rate of the taxing district in which the property is situated.

[2] This fact received judicial recognition in all of the separate opinions filed by the Supreme Court of New Jersey in *Switz v. Middletown Twp.*, 23 N. J. 580, 130 Atl. 2nd 15 (1957). These opinions are set forth in full in Appendix H annexed hereto. (p. 73a to 135a) In the majority opinion in said case, the Court said, page 587:

> "In none of the 567 municipalities of the State is real property assessed at full value. This is not a recent development; it has always been thus. And the Director of the Division of Taxation has found, as the result of a sales-price study, that the assessment ratio for 1956 ranges from a high of 70.8% to a low of 7.8%".

[3] The extent of the discrimination between Class II railroad properties and locally assessed properties was brought into sharp focus

*(Continued on following page)*

In its petition for review relating to the railroad tax assessments levied against it for 1956, Lackawanna contended before Director that after ascertaining the true value of its Class II properties, Director was required to reduce such assessments to the average ratio of assessed to true value shown by his Table of Equalized Valuations to have been in effect in each of the taxing districts in which Lackawanna owned Class II railroad property.

Director stated that under the decision of the Supreme Court of New Jersey in *D. L. & W. R. R. v. Hoboken*, 10 N. J. 418, 433, 91 Atl. 2d 739, 746 (1952), his statutory duty was to assess Class II railroad properties at full true value and he had no power to eliminate discrimination in said assessments even though his Table of Equalized Val-

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*(Continued from preceding page)*

when, in 1953, the Commission on State Tax Policy, acting under a joint resolution of the New Jersey Legislature, prepared a report in which it determined the real estate assessment ratios in each of New Jersey's taxing districts. This report was followed by the enactment of the State School Aid Act of 1954. P.L. 1954, Chapter 85, page 526 and the companion act thereof, P.L. 1954, Chapter 86, page 534 (N.J.S.A. 54:1-35.1 to 35.5). Pursuant to the latter statute, the Director was required to promulgate a table of equalized valuations on or before the 1st day of October each year in which table he was required to show among other things, the "average ratio of assessed to true value of such real estate in the taxing district determined as herein provided". Thereafter, pursuant to said statute, Director established a Bureau through which he analyzed every sale of real property that took place through recorded transactions in New Jersey. He ascertained the ratio between the sales price and the assessment in all *bona fide* arm's length sales transactions in each of the 567 taxing districts throughout the State. Beginning October 1, 1955 and on every October 1st since, the Director has promulgated a table in which he has shown, among other things, the ratio of assessed to true value in each of the taxing districts throughout the State.

uations showed that locally assessed properties in each of the taxing districts in question were assessed at standards of value substantally below true value. Lackawanna thereupon filed a complaint in the Superior Court for a judgment directing Director to eliminate discrimination in his assessments against Lackawanna Class II properties by reducing the said true value assessments to the average ratio of assessed to true value set forth in his Table of Equalized Valuations for 1956 for Jersey City, Hoboken, Secaucus and Newark. Defendants moved to dismiss the complaint. Lackawanna moved for summary judgment. The trial court granted summary judgment for Lackawanna. Appeals were taken by the Director and municipal defendants to the Superior Court, Appellate Division, which appeals were certified by the Supreme Court of New Jersey on its own motion. Said appeals were pending in January, 1957, when petitioners filed their petitions for review with Director with respect to the 1957 railroad tax assessments.

Each petitioner filed its petition for review with Director on January 14, 1957 in which it complained that Director's primary valuations were illegal, excessive and unconstitutionally discriminatory for the following reasons:

> "(a) They violated Article 8, Section 1, Paragraph 1 of the Constitution of New Jersey, 1947, which requires that 'all real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value * * *.'
>
> (b) They discriminated against Erie within the meaning of Article 1, Paragraph 1 of the Constitution of New Jersey.
>
> (c) They deprived Erie of its property without due process of law under the Constitution of New Jersey, 1947.

(d) They discriminated against Erie and denied it the equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

(e) They constituted unlawful interference with and an undue burden upon interstate commerce in violation of Article 1, Section 8 of the Constitution of the United States.

(f) Said assessments were at value in excess of true value."

Petitioners prayed that said assessed valuations be reduced to the level of assessment of properties that are locally assessed in Jersey City, Hoboken, Weehawken, Secaucus, Newark and Camden.

Director took the position that his primary valuations were at full true value, that he had no power to reduce his assessments, and that he would continue said practice of assessing Class II property at full true value until he was directed by the Supreme Court of New Jersey to do otherwise. During the course of the hearing Director intimated that if the Supreme Court decision came down in the "*Lackawanna* case" before March 10, 1957 holding that he was required to eliminate discrimination, he would adjust his 1957 assessments so as to eliminate such discrimination. When it became apparent that the Supreme Court would not decide the "*Lackawanna* case" prior to March 10, 1957, petitioners filed a suit in the Superior Court, Law Division, praying for the Court to enter a judgment staying and restraining Director from certifying his final valuations of petitioners' Class II properties until he had eliminated discrimination in said assessments. The motion for preliminary relief was argued on the afternoon of March 11, 1957 after the publication by the New Jersey Supreme

Court of its opinion in the "*Lackawanna* case"[4] that morning. The trial Court, on the continued return day of the motion, March 13th, denied petitioners' motion for preliminary relief and granted defendants' motion to dismiss the complaints on the ground that he would not assume that Director would not carry out the mandate of the Supreme Court of New Jersey to eliminate discrimination in his Class II assessments.

Director certified his 1957 assessments against petitioners' Class II properties on March 15, 1957, and in so doing he issued a statement designated "Findings and Conclusions" which is printed as Appendix D, annexed hereto, the final paragraph of which is as follows:

> "For all of the foregoing reasons, it has been concluded that the Director has no alternative but to certify forthwith his valuations of Class II railroad property to the respective county boards of taxation, as required by law, on the only basis presently feasible, namely, full true value."

Petitioners filed the complaints, review of which is sought herein, in the Superior Court, Law Division, on April 4, 1957 (Superior Court Record, pp. 1a-43a). Defendants thereupon moved to dismiss the complaints and for summary judgment (Superior Court Record, pp. 48a, 49a). These motions were denied (Superior Court Record, pp. 71-73). Defendants applied for leave to appeal from the order denying said motion and such leave was granted (Superior Court Record, pp. 74a-75). The appeals were perfected in due course and the Supreme Court certified the cases directly (Supreme Court Record, p. 1).

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[4] *Delaware, Lackawanna & Western R.R. Co. v. Neeld*, 23 N. J. 561, 130 Atl. 2nd 6 (1957). Appendix G annexed hereto (p. 58a to 72a).

The cases were duly argued before the Supreme Court of New Jersey and that court by a mandate dated and filed February 17, 1958, reversed the order of the trial court and dismissed the complaints.

The Federal questions sought to be reviewed herein were first raised by petitioners before the Director on their 1957 petitions for review, pertinent portions of which are quoted on pages 8 and 9 *supra.*

These portions of said petitions for review were quoted by petitioners in their complaints filed in these actions. Furthermore, each complaint contained a specific charge that the assessments levied by Director constituted illegal and unconstitutional discrimination in violation of petitioners' rights under the Constitution of the United States.[5]

The demands for judgments in each of the complaints sought a declaration to the effect that the Director's assessments at full true value constitute illegal and unconstitutional discrimination against petitioners in violation of their rights under the Constitution of the United States.[6]

These constitutional questions were argued before the New Jersey Supreme Court but were not the basis of its decision. However, the Court adverted to said issues in its decision. (*Supreme Court record*, page 5) 26 N. J. 172, 177, 139 A. 2d 110.

## Reasons for Granting the Writ

1. This petition presents to this Court again, but in a new aspect, the substance of the question decided by this Court in *Hillsborough* v. *Cromwell*, 326 U. S. 620, 90 L. E. 358, 66 S. C. 445 (1944), namely whether there is any adequate remedy, either in the administrative tribunals or in the

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[5] Superior Court record pages 7a, 16a, 24a, 32a and 41a.

[6] Superior Court record pages 8a, 17a, 25a, 33a and 42a.

courts of New Jersey, when a taxpayer cannot obtain relief from tax discrimination except by forcing an upward revision in the assessments against all other properties in the same class—a procedure this Court, in the *Hillsborough* case, condemned as an intolerable burden, violative of due process and a plainly inadequate remedy to protect the taxpayer's rights under the Federal Constitution.

It is not disputed in this case that petitioners' property was assessed at true value whereas other properties in the same class were assessed at lesser percentages of true value.

The causes, review of which is sought by this petition, came before the Supreme Court of New Jersey on appeals from orders denying motions to dismiss the complaints.

Under the law of New Jersey all facts well pleaded and all inferences reasonably flowing from said facts are admitted for the purposes of such motions.[7]

Therefore, in rendering its decision, the Supreme Court of New Jersey must have assumed the following basic facts to be true:

1. That each defendant municipality had the statutory duty of assessing all locally assessable real property within its borders at full true value.

2. That for many years, including 1957, each defendant municipality failed to assess the locally assessable real property within its borders at full true value, but in total disregard of the law intentionally and systematically

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[7] *Day* v. *Grossman*, 44 N. J. Super. 28, 129 A. 2d 577 (1947); *Schnakenberg* v. *Gibraltar Savings* 37 N. J. 150, 117 A. 2d 191 (1955); *Orrok* v. *Parmigiani*, 32 N. J. Super. 70, 107 A. 2d 815 (1954); *Reinhardt* v. *Wilbur*, 30 N. J. Super. 502, 105 A. 2d 415 (1954); *Newark Twentieth Century Taxicab Ass'n* v. *Lerner*, 11 N. J. Super. 363, 78 A. 2d 315 (1951).

assessed such real property at varying percentages of true value

3. That the Director determined in connection with the preparation of his Table of Equalized Values for 1956 that the average ratio of assessed to true value of real property in the defendant municipalities were as follows:[8]

| | |
|---|---|
| Jersey City | 64.62% |
| Hoboken | 77.61% |
| Weehawken | 53.07% |
| Secaucus | 28.92% |
| Newark | 51.33% |
| Camden | 37.69% |

4. That it was the duty of Director under the Constitution and Laws of New Jersey and under the Constitution of the United States to determine the general or common level of assessment used in the Cities of Jersey City, Hoboken, Newark and Camden, the Town of Secaucus and the Township of Weehawken in the assessment of locally assessable real property within their respective borders and having determined said level or ratio of assessment, to reduce his full true value assessments against petitioners' Class II railroad properties in said municipalities to the general or common level of assessments in said municipalities.

5. That Director arbitrarily refused to perform this constitutional duty but made his final assessment at full true value.

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[8] Similar determinations as to the ratio of assessment in the various defendant municipalities for the years 1953, 1954, and 1955 were made by other State and local tax officials and are set forth in detail in paragraph 10 of the various complaints (Superior Court Record 3a, 4a, 12a, 13a, 20a, 21a, 28a, 29a, 30a, 37a, 38a and 39a).

6. That Director's assessments so made constituted an illegal and unconstitutional discrimination against petitioners in violation of their rights under the Constitution of the United States.

An analysis of the reported cases in New Jersey discloses that there is only one case in which a taxpayer has succeeded in getting relief either before the Division or before a court on the ground of discrimination.[9]

New Jersey decisions relating to proof of discrimination prior to 1944 was summarized by this Court in the *Hillsborough* case at page 624 as follows:

> "The Courts of New Jersey in a long line of decisions have held that a taxpayer who has been singled out for discriminatory taxation may not obtain equalization by reduction of his own assessment. His remedy is restricted to proceedings against other members of his class for the purpose of having their taxes increased. The rule was stated in *Royal Mfg. Co.* v. *Board of Equalization*, 76 N. J. L. 402, 70 A. 978, aff'd 78 N. ~~J. L.~~ 337, 74 A. 525, as follows: '* * * the county boards are required to secure taxation of all property at its true value; so that the fact that the property of A is assessed at its true value and the property of other taxpayers within the same district is assessed below its true value, affords A no ground for demanding a reduction of his valuation, though it does entitle him to apply for an increase in the valuation of the others.' 76 N. J. L. pp. 404-405. On the basis of that rule it is plain that the state remedy is not adequate to protect respondent's rights under the Federal Constitution."

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[9] The case referred to is *Baldwin Construction Company* v. *Essex County Board of Taxation*, 16 N. J. 329, 108 A. 2d 598 (1954).

Ten years later the New Jersey Supreme Court recognized the rule established by this Court in the *Hillsborough* case in *Baldwin Construction Company* v. *Essex County Board of Taxation*, 16 N. J. 329, 108 A. 2d 598 (1954). In that case, the Essex County Board of Taxation selected certain properties in so-called "100% locations" in five municipalities and arbitrarily increased the assessments against said parcels without adjusting assessments against any other properties in said municipalities. Taxpayers filed suits in the Superior Court to have said increases in assessments set aside as discriminatory. Defendants moved to strike the complaints on the same grounds urged by the defendants herein. These motions were denied by the trial court. On appeal to the Supreme Court of New Jersey, the judgments were affirmed. The Court said at page 339:

> "There is pleaded here a common remediable grievance arising from a discriminatory tax visitation now established by the proofs, unequal in its incidence and oppressive in its burden; and in the treatment of the issues raised we are to be mindful that this is a judicial proceeding to redress a basic inequality in the apportionment of the charge, violative of constitutional principle. We are not concerned here with failures or omissions in the administrative assessment process not related to inequality of treatment."

and at page 343:

> "The right invoked here is that of equal treatment—relief from what is obviously discriminatory taxation; and judicial interposition may be had for the correction of the wrongful discrimination. Such is the remedy sought by the plaintiff property owners, and equalization of treatment will fully redress the wrong."

In *Gibraltar Corrugated Paper Co.* v. *North Bergen Township*, 20 N. J. 213, 119 A. 2d 135 (1955) the Supreme Court of New Jersey was called upon to determine whether Division had jurisdiction to give relief in tax appeals wherein discrimination was alleged. Division had held that it was without jurisdiction in such matters. The Supreme Court not only held that Division was vested with such jurisdiction in all tax appeals, but it specifically held (page 219), that in the *Baldwin* case it had directly overruled the doctrine of *Royal Manufacturing Co.* v. *Board of Equalization of Taxes*, 76 N. J. L. 402, 70 A. 2d 978, aff. 78 N. J. L. 337, 74 A. 2d 525 (1909) which case placed "an insuperable task upon an aggrieved taxpayer to himself seek an upward revision of all other assessments in his taxing district to true value".

The hearings before Director relating to his 1956 railroad tax assessments were held in January and February 1956, shortly after the decision of the Supreme Court in the *Gibraltar* case. At these hearings petitioners contended that under the decisions of the Supreme Court of New Jersey in the *Baldwin* and *Gibraltar* cases referred to above, it was Director's constitutional duty to eliminate discrimination by reducing his Class II assessments to the level of local assessments indicated by his Table of Equalized Valuations promulgated on October 1, 1955.

Director arbitrarily took the position that he was governed by the holding of the Supreme Court of New Jersey in *D. L. & W.* v. *Hoboken*, *supra*, and that he had no power to do anything but assess Class II railroad properties at full true value.

Lackawanna, upon being advised by Director as to what he intended to do with respect to his 1956 assessments, filed a suit in the Superior Court for a declaratory judgment that Director had the power and duty to assess at less than full true value where it was necessary to do so to avoid discrimination and for relief in the nature of mandamus to compel Director to reduce his assessments to the average ratios at which properties were assessed in the defendant taxing districts. Cross motions for summary judgment were made. The trial court entered judgment for Lackawanna and held that Director had a constitutional duty to reduce his Class II assessments below full true value where it was necessary to eliminate discrimination and that the ratios of assessed to true value established by the Director in his Table of Equalized Valuations were conclusive proof as to the level of local assessments in the taxing districts concerned. The Trial Court further held that the refusal of Director to reduce his Class II assessments constituted discrimination under the Federal and State Constitutions. Appeals were taken by the Director and the defendant municipalities. These appeals were certified by the Supreme Court of New Jersey on its own motion. That Court in an opinion filed March 11, 1957, *Delaware Lackawanna & Western Railroad Company* v. *Neeld*, 23 N. J. 561, 130 A. 2d 6 (1957), a copy of which is annexed hereto as Appendix F, (p. 38a to 57a) affirmed the trial court insofar as it held that Director had the legal power and obligation to correct an unconstitutional discriminatory assessment by reducing it to the common or uniform assessment ration of true value applicable to all alike in the same class.

However the Court thwarted the giving of relief to taxpayers who are discriminated against by holding that a taxpayer could not prove the common level of assessment in any taxing district by the use of sales ratios or any other method of averaging. The Court said at page 573:

> "But Lackawanna's argument to sustain the judgment proceeds on the fundamental misconception that the

> sales-assessment ratios found by the Director for the apportionment of the moneys provided for state school aid under N.J.S.A. 54:1-35.1, are 'competent proof in an individual discrimination case,' and 'conclusive upon him as a matter of law,' citing *City of Passaic* v. *Passaic County Board of Taxation*, 18 N. J. 371 (1955).
>
> There is an essential difference between a common or uniform assessment ratio of true value applicable to all alike in the same class and the 'average' assessment ratio of true value. The 'common' ratio imports general equality in the incidence of the tax, the equality of burden that is of the essence of constitutional uniformity; the 'average' ratio is the arithmetical mean or median of varying ratios of true value, necessarily making for unequal proportions of value and thus for inequality of treatment and burden in the apportionment of the tax as between the several property owners."

After the decision of the Supreme Court in the *Gibraltar* case, the Division, which the Supreme Court has held to be composed of experts in the field of taxation,[10] initiated the practice of eliminating discrimination on appeals wherein that claim was asserted, by determining the true value of the subject property and applying the ratio for the taxing districts involved as determined either by the Division in county equalization proceedings or by the Director in his Table of Equalized Valuations or by combining both methods. This practice was brought to an abrupt end as a result of the opinion of the Supreme Court of New Jersey in the *Lackawanna* case.

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[10] *D. L. & W.* v. *Hoboken*, *supra*, at page 425.

In *North Bergen Township* v. *Venino*, 45 N. J. Super. 143, 131 A. 2d 792 (1957) (a copy of which opinion is annexed as Appendix J hereto p. 138a to 141a), such a judgment of the Division was under review. The Appellate Division reversed the judgment of the Division and held that proof of the average ratios ascertained by the Director or by the Division in county equalization proceedings or both taken together, is not competent to establish the common level of assessment in any taxing district and did not meet the standards of proof established by the Supreme Court in the *Lackawanna* case.

This subject matter received further attention by the Appellate Division, in *Jat Co. Inc.* v. *Division of Tax Appeals*, 47 N. J. Super. 571, 136 A. 2d 666 (1957). (A copy of this opinion is annexed as Appendix K hereto p. 142a to 155a). In that case, the Appellate Division discussed the manner in which a taxpayer could prove discrimination, at page 581:

> "We prefer not to rest an affirmance of the judgments under appeal on the point developed in I, *supra*, as the application of the 'average' ratios by the Division to true value was improper, even though the taxing district has not appealed therefrom. *North Bergen Township* v. *Venino*, 45 N. J. Super. 143 (App. Div. 1957). As was pointed out by Judge (now Mr. Justice) Francis in that case (45 N. J. Super. at page 147), 'the average ratio achieved in the statutory equalization process is the arithmetical mean of the varying percentages of true value applied by the local assessor in assessing properties in the taxing district.' Such a ratio is distinctly not to be equated with a 'common ratio' properly understood, which signifies that 'the *same standard* or percentage of value is used in assessing *each property* in the district' (emphasis supplied), ibid.; and see *Switz* v. *Middletown Town-*

*ship,* 23 N. J. 580, 595 (1957). The Division is not at liberty, in any case, as the law now stands, to enter judgments at percentages of true value based upon 'average ratios' of assessment, where there is nothing more to support the case for discrimination than the determination of such a ratio, no matter by whom established. *North Bergen Township* v. *Venino, supra.*"

The holdings of the Superior Court in the *Venino* and *Jat* cases were approved by the Supreme Court of New Jersey in its very recent decision in *Hoboken* v. *Jarka,* 26 N. J. 336, 139 A. 2d 737 (1957). In that case the Supreme Court reversed the judgment of the Division in which Division had eliminated discrimination in a local assessment by the application of an average ratio. Said cases also received approbation of the Supreme Court in its decision in the subject case (Appendix A annexed hereto p. 5a.)

More recently the Division of Tax Appeals gave effect to the rulings in the *Lackawanna* case, the *Venino* case and the *Jat* case by granting a motion to dismiss allegations of discrimination made by Pennsylvania in tax appeals involving the assessments of Class II properties in Jersey City for the years 1953 through 1956. Pennsylvania, through a recognized real estate expert, analyzed every sale of real property made in Jersey City between July 1, 1946 and December 31, 1955. In that analysis he determined which of the sales were bona fide arm's length transactions between willing buyers and willing sellers. He found 17,000 such transactions and compiled the data with respect to them in exhibit form. These exhibits showed, among other things, the identity of the properties sold, date of each sale, assessed valuation as of the year of the sale of properties sold and the consideration in each sale. The ratios of assessed to true value were computed and indicated in said exhibits. This data was summarized in a separate exhibit showing the over-all average ratio of assessment to true value, the average of assessed to true value in each year involved and an analysis by the formula adopted by the Director in developing his Table of Equalized Valuations. This information was summarized in total and year by year.

The over-all average percentage assessment to true value as reflected by sale price for the entire period was 65.9%.

Pennsylvania introduced other exhibits through a statistical expert showing the mean or arithmetical average of the array of ratios developed in the sales study, the median or middle point in the array, and the mode or the ratio around which most of the items in the array clustered. The ratios thus developed for each year in question tended to corroborate the results developed by the real estate expert in his study.

Similar analyses were developed by this witness of the sales studies made by the Director and used in the development of his ratios for school aid purposes.

After the completion of Pennsylvania's discrimination case, Jersey City moved before Division to dismiss the allegations of discrimination in Pennsylvania's complaints on the ground that said evidence did not provide a legal basis for relief from discrimination. The Division by a vote of 4 to 2 granted the motion and filed opinions which are annexed as Appendix L hereto. (p. 156a to 186a)

The most significant portion of the majority opinion seems to us to be contained in the following statement (Appendix L, p. 179a):

> "It follows from all that has been said that a common level as defined by our Courts probably does not exist in many of our taxing districts."

A keen analysis of the unconstitutional results inherent in the rule enunciated by the Supreme Court of New Jersey in the *Lackawanna* case and developed by the Appellate Division with the approval of the State Supreme Court in the *Venino* and *Jat* cases is contained in the dissenting opinion of Commissioner Kopp filed in the *Pennsylvania* case before the Division. He said (Appendix L, p. 182a):

> "If the opinion of the majority is a correct interpretation of the law, i.e. that the common level of assessment to true value cannot under any circumstances be determined by averaging several ratios of assessment to true value, then the law has placed a premium on disparity of assessment. An assessor may, therefore, prevent a taxpayer from obtaining relief from an assessment which places a greater burden of taxation upon him than many other taxpayers in the same taxing district merely by being certain to have more than one level of assessment, no matter how slight the variance between them.
>
> For example—assuming a taxing district having only five taxable parcels of real property—two parcels are assessed at 10% of true value, two parcels are assessed at 50% of true value and one parcel is assessed at 100% of true value. It is obvious that there is either no common level of assessment or the common level of assessment is an average of all five parcels. If we accept the interpretation of the majority that the common level can never be reached by averaging ratios, or using the median or modal approach, then there is no common level and the taxpapers who are assessed at 100% and 50% of true value quite obviously bear an unfair burden of taxation and yet before the Division of Tax Appeals they are without remedy or relief. By this result we have neither adherence to the statutory requirement of assessment at true value nor that

uniformity and equality of assessment which is said to be the just and ultimate purpose of the law.

In this case it is admitted that the property of the Railroad is assessed at 100% of true value and that a great percentage of the other taxpayers in Jersey City are paying taxes based on a much lower ratio of assessment to true value. That this, per se, constitutes discrimination against the Railroad seems to be crystal clear. If this Division cannot grant relief, and it cannot under the majority's interpretation of the law, then, to whom does this taxpayer turn for aid in obtaining equal treatment under the law?"

From the foregoing it must be apparent that while the New Jersey Supreme Court has paid lip service to the doctrine enunciated by this Court in the *Hillsborough* case, it has clearly re-established the principle that the only manner in which a taxpayer who is discriminated against can obtain relief is by a revaluation of all of the properties in the taxing district to a level of 100% of true value. See *Switz* v. *Middletown Township*, 23 N. J. 580, 130 A. 2d. 15 (1957).

It is important to note in connection with the *Switz* case that even in the situation where the Court orders a revaluation, the taxpayer who is discriminated against has to wait a minimum of two years before he can get any relief under that doctrine.

The opinions in the *Switz* case (decided on the same day as the *Lackawanna* case) are annexed as Appendix H hereto (p. 73a to 135a) because they discuss and explain the admittedly indefensible "century old" practices of local assessors throughout New Jersey and point up the wholesale disregard of true value assessment in all (excepting perhaps one) of the 567 taxing districts of New Jersey. They further show the great weight given by the Court to the Director's average ratios as indicative of the actual level at which assessments have been made. They indicate judicial recognition that there is no common level of assessment, in the sense that those words are used by the Supreme Court of New Jersey, in any (excepting possibly one) taxing district. See majority opinion at page 586. See concurring opinion at page 600 to the following effect:

> "In addition to this inter-municipal maneuvering, discrimination as among taxpayers within the taxing district has been characteristic. Broadly speaking, different percentages of true value have been evolved as to farm land, vacant land, dwellings, and commercial and industrial properties, reflecting local appraisals of ability to pay or other local interests. In the certain areas, largely urban, commercial and industrial properties have absorbed a higher tax burden than other classes of real property. In some areas the reverse is true, tax advantage having been used to attract enterprises which but for this preferential treatment would have located elsewhere to obtain the benefit of other economic factors."

Under the State Constitution, such classification is, of course, illegal. However, even within such unconstitutional classifications, there is no common level as shown by the ranges that existed in Middletown (p. 603), which are representative of the situation in all taxing districts.

As explained in the concurring opinion (p. 601), the very reason for enactment of the statute requiring the Director to promulgate average ratios was because these violations of law were known by the legislature to exist. Finally, the concurring opinion practically concedes that the courts of New Jersey have not fulfilled their responsibility to provide an adequate remedy against discriminatory assessments: (p. 607)

> "It is the obligation of the judiciary to refrain from peremptory action which may raise havoc with the public welfare. None of us is happy about the spectacle of a constitution or a statute ignored. But there is no appropriate whipping boy, neither the five million citizens of our State nor the assessors who fell heir to this extraordinary problem. Although ultimately we must act, yet it is equally our duty to give our citizens a decent opportunity to seek an orderly solution of the manifold problems through their elected representatives or by constitutional amendment if they should conclude one to be necessary and desirable."

We believe our analysis of the New Jersey decisions clearly demonstrates that its courts and the Division, to which petitioners have been relegated by the court below, require a taxpayer against whose property an admittedly discriminatory assesment at full true value has been levied, to prove that all other properties in the taxing district are assessed at a comon level. It is impossible to satisfy this burden of proof because even though a taxpayer has been grossly discriminated against, the discrimination does not arise from uniform assessments below true value, but rather from an intentional and systematic practice of assessing properties below true value at various levels.

The Supreme Court of New Jersey and its intermediate appellate courts and the Division have arbitrarily rejected the use of average ratios as a method of proving either the fact or the extent of discrimination. In so doing they gave no cogent reason to show that such averages were not the most useful tool available to a court or administrative agency seeking to eliminate tax discrimination.

The use of average ratios developed from sales studies received the approval of this Court in *Sioux City Bridge* v. *Dakota County*, 260 U. S. 441, 67 L. E. 340, 43 S. C. 190

(1923). In that case the percentage of true value at which other properties in Dakota County were assessed came from a sales ratio study which was substantially similar to the sales studies of the Director and of the real estate expert witness in petitioner Pennsylvania's case before the Division.

In *Louisville & Nashville R. R. Co.* v. *Bosworth*, 230 Fed. 191, 222, (D. C. E. D. Ky. 1915), the court specifically advocated the use of sales assessment average ratios to determine the level to which a taxpayer who has been discriminated against should have his assessment reduced. See also *Sears, Roebuck & Co.* v. *State Tax Commissioner*, 136 A. 2d 567, 214 Md. 550 (Ct. of A. of Md. 1957) and *Bemis Bros. Bag Co.* v. *Claremont*, 98 N. H. 446, 102 A. 2d 512 (Sup. Ct. of N. H. 1954).

Recently the Supreme Court of Pennsylvania dispelled the trial court's theory that a common ratio of assessment throughout the taxing district was essential to be proved in order to obtain relief from a discriminatory assessment. *In Re Brooks Building*, 137 A. 2d 273, 275 (1958), 391 Pa. 94. The Court said:

> "The reason the Court below concluded it could not help was because it believed that the Superior Court had decided that the burden was upon the taxpayer to prove that a *fixed* ratio of assessed value to actual value was applied *generally* throughout the district, and in the absence of such proof actual value is conclusive. In other words, if an assessor, without actual fraud, negligently, foolishly or capriciously assessed some properties at 10% of actual value, other similar properties at 20%, other similar properties at 50%, others at 75%, and plaintiff's at 90%, it would be unjust and ridiculous to hold that since there was no fixed ratio of assessed value to actual value *generally* throughout

the district, plaintiff failed to prove a lack or violation of uniformity which the Constitution requires."

We submit that because of the assessing practices that prevail in New Jersey, petitioners are deprived of due process unless they are permitted the use of average ratios in order to determine the fact and extent of discrimination.

Therefore, we respectfully submit that petitioners were deprived of their property without due process of law and denied equal protection of the law under the Constitution of the United States by the dismissals of their complaints, review of which is sought herein.

2. The second ground upon which petitioners contend they were denied their rights under the United State Constitution is that while the Supreme Court of New Jersey directed them to exhaust their remedies before the Division, they have no reasonable prospect of having their appeals before the Division heard in the foreseeable future. This Court recognized that property may be as effectively taken by long continued and unreasonable delay as by affirmative action. *Smith v. Illinois Bell Telephone Co.*, 270 U. S. 587, 591, 70 L. E. 747, 46 S. C. 408 (1926).

The delay which petitioners encountered in having their appeals heard before the Division was so great as to cause all petitioners, except Pennsylvania, to file a complaint in the Superior Court on May 7, 1957 requesting that court to take jurisdiction of all railroad tax appeals affecting their properties pending before Division and hear them in order that the deprivation of property suffered by petitioners by the inordinate delay might be minimized. A copy of one of said similar complaints is annexed as Appendix F to this petition. (p. 38a to 57a)

The over-all statistics with respect to the railroad tax appeals pending before the Division are set forth in paragraphs 20 to 29 (Appendix F, p. 43a to 49a). During the period from May, 1953 to May, 1956, 101 appeals relating to Class II railroad properties were filed with the Division involving properties having a total assessed valuation of $420,000,000. Of said cases, Division has only heard and finally disposed of 7 cases, or 7% of the cases pending before it. During the period from May, 1949 to May, 1956 approximately 175 appeals came before the Division relating to Class II railroad properties of which Division only heard and finally disposed of 25 cases or approximately 14% of the cases relating to Class II railroad tax assessments.

The defendants named in said Superior Court suit filed by the railroads, moved to strike the complaint on the ground that petitioners were required to exhaust their administrative remedy before having recourse to the courts. This motion was granted by the trial court and was affirmed on appeal by the Supreme Court of New Jersey in an opinion filed the same day as the opinion in the case, review of which is sought herein. Said opinion is printed as Appendix E annexed hereto. (p. 28a to 37a) (*Central Railroad Company* v. *Neeld*, 26 N. J. 188 (1957), 139 A. 2d 119).

For the foregoing reasons, we respectfully submit that since there is no reasonable prospect that petitioners will have a hearing on their appeals which are pending before the Division, within the reasonably foreseeable future petitioners' appeals to the Division do not constitute an adequate administrative remedy.

3. The deprivation of petitioners' constitutional rights due to the lack of an effective administrative remedy before Division resulting from the impossible burden of proof imposed upon petitioners by the doctrine of the *Lackawanna* case, when combined with the interminable

delays encountered by petitioners in having their cases heard before Division, are substantially compounded under the laws of New Jersey. Under N.J.S.A. 54:29A-53, Appendix N, p. 198a, petitioners are required to pay their taxes in full or run the risk of having to pay penalty interest on all unpaid tax balances at the rate of 1% per month. Furthermore, if petitioners after having paid their said taxes, are determined to have been overassessed, they will not be entitled to receive a cash refund, nor will they be entitled to receive any interest on the amount of the overpayment. They will only obtain a credit for the amount so overpaid against taxes next legally due. N.J.S.A. 54:29A-49, Appendix N, p. 197a.

4. This Court has frequently recognized that the policy underlying the exhaustion of remedies doctrine does not require the exhaustion of inadequate remedies. That recognition was the basic rationale invoked by this Court in the *Hillsborough* case. Some of the other cases were cited by this Court in the following footnote to the concurring opinion in *Marino* v. *Ragen*, 332 U. S. 561 (1947), 92 L. E. 170, 68 S. C. 240, said footnote being as follows:

> "This Court has frequently recognized that the policy underlying the exhaustion-of-remedies doctrine does not require the exhaustion of inadequate remedies. *Hillsborough Twp.* v. *Cromwell*, 326 U. S. 620; *White* v. *Ragen*, 324 U. S. 760; *Driscoll* v. *Edison Co.*, 307 U. S. 104; *Mountain States Co.* v. *Comm'n*, 299 U. S. 167; *Corporation Comm'n* v. *Cary*, 296 U. S. 452; *Pacific Tel. Co.* v. *Kuykendall*, 265 U. S. 196; *Okla. Gas Co.* v. *Russell*, 261 U. S. 290; *Moore* v. *Dempsey*, 261 U. S. 86; *Wallace* v. *Hines*, 253 U. S. 66."

We submit therefore that Supreme Court of New Jersey denied petitioners equal protection of the law and due process of law in violation of the Constitution of United States when it dismissed their Complaints and relegated them to the Division where their remedy is completely inadequate.

5. This Court held, in the *Hillsborough* case (page 623):

> "The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class."

In the case at bar, assessments which are admittedly patently discriminatory were levied by New Jersey against petitioners. It would seem to follow that the Supreme Court of New Jersey deprived petitioners of their constitutional rights under the United States Constitution by refusing to declare said discriminatory assessments null and void and refusing to remand the matter to the Director for the levying of patently constitutional assessments in the first instance.

## CONCLUSION

**For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.**

Respectfully submitted,

Joseph C. Glavin,
*Counsel for Petitioners, Pennsylvania Railroad Company and Central Railroad Company of New Jersey.*

Augustus Nasmith,
*Counsel for Petitioners, Delaware, Lackawanna and Western Railroad Company.*

Raymond J. Lamb,
*Counsel for Petitioners, Erie Railroad Company and Lehigh Valley Railroad Company.*

# Appendix A

## Opinion of the Supreme Court of New Jersey
## (No. A-62, September Term, 1957)

◆

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation of the State of New Jersey,

Plaintiff-Respondent,

*vs.*

AARON K. NEELD, Director, Division of Taxation in the Department of the Treasury, State of New Jersey,

Defendant,

*and*

CITY OF JERSEY CITY, a municipal corporation of the State of New Jersey,

Defendant-Appellant.

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THE PENNSYLVANIA RAILROAD COMPANY, a corporation of the Commonwealth of Pennsylvania,

Plaintiff-Respondent,

*vs.*

AARON K. NEELD, Director, Division of Taxation, etc.,

Defendant,

*and*

CITY OF JERSEY CITY, CITY OF HOBOKEN, CITY OF CAMDEN, and TOWN OF SECAUCUS, all municipal corporations of the State of New Jersey,

Defendants-Appellants.

Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania,

Plaintiff-Respondent,

*vs.*

Aaron K. Neeld, Director, Division of Taxation, etc.,

Defendant,

*and*

City of Jersey City, and City of Newark, municipal corporations,

Defendants-Appellants.

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The Delaware, Lackawanna and Western Railroad Company, a corporation,

Plaintiff-Respondent,

*vs.*

Aaron K. Neeld, Director, Division of Taxation, etc.,

Defendant,

*and*

Cities of Hoboken, Jersey City and Newark, and Town of Secaucus, municipal corporations,

Defendants-Appellants.

## *Appendix A*

ERIE RAILROAD COMPANY, a corporation of the State of New York,

Plaintiff-Respondent,

*vs.*

AARON K. NEELD, Director, Division of Taxation, etc.,

*and*

CITY OF JERSEY CITY, a municipal corporation of the State of New Jersey, CITY OF HOBOKEN, a municipal corporation of the State of New Jersey, TOWNSHIP OF WEEHAWKEN, a municipal corporation of the State of New Jersey, and TOWN OF SECAUCUS, a municipal corporation of the State of New Jersey,

Defendants-Appellants.

◆

Argued January 6 and January 7, 1958; decided .

Messrs. Leo Rosenblum and Herbert H. Fine argued the causes for the appellants (Mr. Ezra L. Nolan, Corporation Counsel of the City of Jersey City, Attorney for defendant-appellant City of Jersey City; Mr. James Rosen, Attorney for defendant-appellant Township of Weehawken; Mr. David Pollack, Attorney for defendant-appellant Town of Secaucus; Mr. Vincent P. Torppey, Corporation Counsel, Attorney for defendant-appellant City of Newark; Mr. Norman Heine, Attorney for defendant-appellant City of Camden).

Messrs. Raymond J. Lamb, Joseph C. Glavin and Augustus Nasmith argued the causes for the respondents (Messrs. Emory, Langan, Lamb & Blake, Attorneys for plaintiffs-respondents Erie Railroad Company and Lehigh Valley Railroad Company).

## *Appendix A*

The opinion of the Court was delivered by JACOBS, J.:

These are five consolidated appeals from interlocutory orders of the Law Division denying the defendants' motions to dismiss the complaints filed by the plaintiff railroad companies. Leave to appeal was granted by the Appellate Division (R.R. 2:2-3(a)) and we certified on our own motion (R.R. 1:10-1(a)).

Prior to December 10, 1956 the defendant Aaron K. Neeld, Director, Division of Taxation in the Department of the Treasury, made his preliminary determinations of the true value of various Class I and Class II properties of the plaintiff railroads including properties located in the defendant municipalities. See R.S. 54:29A-17. In accordance with R.S. 54:29A-18 petitions were filed on January 14, 1957 by all of the railroads alleging that the valuations were excessive and discriminatory and by most of the municipalities alleging that the valuations were below true value. On January 29, 1957 hearings were held by the Director and the railroads stressed that he was obligated to eliminate discrimination in his Class II railroad assessments by reducing the level of assessments “to the general ratio of assessments in the taxing districts”. In response the Director indicated that, under the law as he then conceived it, he was in all events required to assess Class II properties at true value. On March 5, 1957 the railroads filed actions in the Law Division in which they sought (1) a declaration that the Director had the power and duty to assess their Class II properties according to the “average ratio of assessed to true value” employed by the defendant municipalities in assessing other real property within their borders, and (2) an order enjoining the Director from certifying his final valuations until he had eliminated the alleged discrimination between the Class II properties and other real property. In these actions there were motions for summary judgment and for dismissal of the complaints; on March 13, 1957 the Law Division dismissed the complaints in an order which set forth that, since the Supreme Court had on March 11, 1957 decided in *Delaware, Lackawanna and Western R. R. Co.* v. *Neeld*, 23 N. J. 561 (1957), that the Director had jurisdiction to make his final assessment at less than true value when necessary to prevent discrimination, it was unnecessary for the Law Division so to declare.

On March 15, 1957 the Director certified his 1957 assessments against the railroads' Class II properties in the defendant municipalities and filed findings and conclusions in which he recognized the Supreme Court's ruling that he was empowered and required to make his final assessments of Class II railroad property "at the common level of assessment prevailing in the respective taxing districts" but found that at no time during the hearings before him had any proof been adduced to show such common level of assessment. He pointed out that the Supreme Court had held that the average assessment ratio as shown on the Director's Table of Equalized Valuations (R.S. 54:1-35) was not synonymous with and did not represent the common level of assessment in the taxing district and that the railroads had failed to introduce any proof as to true value or common level of assessment and that no yardsticks were presently available from which he could make a proper determination of common level of assessment. See *Delaware, Lackawanna and Western R. R. Co.* v. *Neeld*, *supra*, 23 N. J. at 573. *Cf. Switz* v. *Middletown Twp.*, 23 N. J. 580, 594 (1957); *Jat Company, Inc.* v. *Division of Tax Appeals*, 47 N. J. Super. 571, 581 (App. Div. 1957);

*North Bergen Twp.* v. *Venino,* 45 N. J. Super. 143, 147 (App. Div. 1957). After referring to the public need for avoiding delay in his final certification and the availability of complete review in the Division of Tax Appeals (R.S. 54:29A-31) he certified his valuations of Class II railroad properties at true value. In due course the railroads filed appeals to the Division of Tax Appeals from the Director's action and those appeals are now pending. In addition the railroads filed their present complaints in the Law Division seeking final judgments (1) declaring that the 1957 assessments against their Class II properties constitute illegal and unconstitutional discrimination against them and are null and void and (2) ordering the Director to ascertain the general or common ratio of locally assessed properties in the municipalities and reducing his 1957 assessment to such general or common standard of assessment. The defendant municipalities moved to dismiss the complaints but their motions were denied and their present appeal is from that action. In support of their appeal they now urge (1) that the Law Division's dismissal of the plaintiffs' earlier complaints on March 13, 1957 is *res judicata* and precludes their present actions; (2) that the plaintiffs have failed to exhaust their administrative appeal to the Division of Tax Appeals as required by R.R. 4:88-14; and (3) that in any event the plaintiffs' actions should have been brought under R.R. 4:88-8 in the Appellate Division rather than in the Law Division.

We reject the appellants' contention that the dismissal order of March 13, 1957 is *res judicata* and in itself precludes the railroads' present actions. The doctrine of *res judicata* is well designed to preclude the relitigation of issues which have been fairly and finally determined but it ordinarily does not come into play where the parties have not had an adjudication on the ultimate merits. See

*Meier Credit Co.* v. *Yeo*, 129 N. J. L. 82, 86 (E. & A. 1942); *Longo* v. *Reilly*, 35 N. J. Super. 405, 410 (App. Div. 1955). *Cf. McCarthy* v. *State*, 1 Utah 2d 205, 265, P. 2d 387, 49 A. L. R. 2d 1031 (1953); 30 *Am. Jur. Judgments*, §§ 208, 209 (1940). The dismissal order of March 13th did not determine any of the ultimate merits of the present tax controversy. The earlier complaints presented somewhat different issues and were dismissed because the trial court considered that in view of the March 11th pronouncement of the Supreme Court in *Delaware, Lackawanna and Western R. R. Co.* v. *Neeld*, *supra*, there was then no just occasion for the declaratory and injunctive relief being sought by the railroads from the Law Division. The municipalities' motions for dismissal had included a ground based on the doctrine of exhaustion of administrative remedies but there is nothing in the record to suggest that the dismissals were in anywise rested on that ground. Although we are satisfied that *res judicata* principles have no real pertinence, the appellants may of course urge here, as they did below, that the present complaints should be dismissed because the railroads failed to exhaust the administrative appeal which is admittedly available to them under R.S. 54:29A-31 and is actually pending before the Division of Tax Appeals.

The doctrine that a litigant must first exhaust his administrative remedies before he seeks judicial review is widely recognized and has been the subject of extended discussion. See *Davis, Administrative Law* 614 (1951); *Parker, Administrative Law* 117 (1952); *Berger, Exhaustion of Administrative Remedies*, 48 *Yale L. J.* 981 (1939); *Stason, Timing of Judicial Redress from Erroneous Administrative Action*, 25 *Minn. L. Rev.* 560 (1941); *Comment, Exhaustion of Administrative Remedies*, 39 *Cornell L. Q.* 273 (1954). *Cf. Ward* v. *Keenan*, 3 N. J. 298 302

(1949); *Nolan* v. *Fitzpatrick*, 9 N. J. 477, 484 (1952); *Waldor* v. *Untermann*, 10 N. J. Super. 188, 190 (App. Div. 1950). In the Federal sphere the doctrine has been said to date back to the advent of the Interstate Commerce Commission in 1887 (*Ward* v. *Keegan*, *supra*, 3 N. J. at 302) and *Dundee Mortgage Trust Invest. Co.* v. *Charlton*, 32 Fed. 192 (C. C. D. Ore. 1887) and *Altschul* v. *Gittings*, 86 Fed. 200 (C. C. D. Ore. 1898) have been cited as its earliest manifestations. See *Berger*, *supra*, 48 *Yale L. J.* at 981 n. 1. There the Federal courts declined to grant relief to taxpayers who complained about excessive and discriminatory tax assessments without having taken the administrative appeals available to them. Similar tax assessment cases of equal or even greater vintage may readily be found in our own State reports. See *Appelget* v. *Pownell*, 49 N. J. L. 169 (Sup. Ct. 1886); *State, Hall* v. *Snedeker*, 42 N. J. L. 76 (Sup. Ct. 1880); *State, Young* v. *Parker*, 34 N. J. L. 49 (Sup. Ct. 1869); *State* v. *Powers*, 24 N. J. L. 406 (Sup. Ct. 1854); *The State* v. *Danser*, 23 N. J. L. 552 (Sup. Ct. 1852).

The doctrine has been freely applied in New Jersey not only in tax assessment cases where administrative appeals have been available from earliest times (see Laws of New Jersey 1703-1820 at p. 308) but in many other situations where adequate administrative appeals were provided by the Legislature. In *Jefferson* v. *Board of Education*, 64 N. J. L. 59 (Sap. Ct. 1899) the relator sought a writ of mandamus to compel action by the Board of Education of Atlantic City to admit his son to the Indiana Avenue school. The court denied the relator's application on the ground that he was obliged to exhaust the administrative appeals provided in the school law of the State before seeking judicial relief. In the course of its opinion the court pointed out that the legislative branch had wisely provided a chain of administrative tribunals which was empowered to deal with school controversies and that the judicial branch should, in the exercise of its discretion, generally stay its hand pending completion of the statutory steps on review. Many later cases under the school law have taken the same approach. See *Draper* v. *Comm'rs of Public Instruction*, 66 N. J. L. 54 (Sup. Ct. 1901); *Stockton* v. *Board of Education*, 72 N. J. L. 80 (Sup. Ct. 1905); *Montclair* v. *Baxter*, 76 N. J. L. 68 (Sup. Ct. 1908); *Ridgway* v. *Upper Freehold Bd. Education*, 88 N. J. L. 530 (Sup. Ct. 1916). *Cf. Koven* v. *Stanley*, 84 N. J. L. 446 (Sup. Ct. 1913); *Waldor* v. *Untermann*, *supra*.

In *Lutz* v. *Kaltenbach*, 101 N. J. L. 316 (Sup. Ct. 1925), the relators sought a writ of mandamus to compel the issuance of a permit by a building inspector; the court denied relief, pointing out that the relators should first "exhaust their remedy" by taking their appeal to the board of adjustment established under the zoning law. In *Matthews* v. *Asbury Park*, 113 N. J. L. 205 (Sup. Ct. 1934) the court denied an application for writ of certiorari to review the issuance of a liquor license; in the course of its opinion the former Supreme Court expressed the view that the "appellate provisions" of the Alcoholic Beverage Control Act should have been exhausted before judicial relief was sought. In *Jamouneau* v. *Newark*, 132 N. J. L. 117 (Sup. Ct. 1944) the court dismissed a writ of certiorari which had been allowed to review the 1944 municipal budget for Newark; the budget had been approved by the Commissioner of Local Government but no application had been made to the State Board to review the Commissioner's approval. The court took the position that the case before it was one where all of the statutory appeals "must be pursued before recourse to the courts" and quoted approvingly from *Florenzie* v. *East Orange,* 88 N. J. L. 438 (Sup. Ct. 1916) where the court declined to review the validity of an assessment for benefits because the applicant for the writ of certiorari had failed to exhaust his available statutory appeal.

The doctrine of exhaustion of administrative remedies was applied in the foregoing cases as a rule of orderly procedure which embodied due and deferential regard for the legislative wisdom and policy in providing expert administrative review tribunals to deal with the specialized fields entrusted to them. It was not viewed as an absolute or jurisdictional rule and, when the interests of justice so required, was departed from by the immediate judicial granting of prerogative writ relief. See *Lane* v. *Bigelow,* 135 N. J. L. 195, 200 (E. & A. 1947); *Redcay* v. *State Board of Education,* 128 N. J. L. 281, 284 (Sup. Ct. 1942); *Conaway* v. *Atlantic City,* 107 N. J. L. 404, 408 (Sup. Ct. 1931). *Cf. Davis, Administrative Remedies Often Need Not Be Exhausted,* 19 F. R. D. 437, 487 (1957). When the prerogative writs were superseded in 1948 they were replaced by the procedure embodied in R.R. 4:88 which expressly retained the exhaustion-of-remedies doctrine; thus R.R. 4:88-14 has at all times provided that "except where it is manifest that the interests of justice require otherwise, proceedings under Rule 4:88 shall not be maintainable, so long as there is available judicial review to a county court or inferior tribunal or administrative review to an administrative agency or tribunal, which has not been exhausted." In the instant matter the proceedings by the railroads in the Law Division were admittedly instituted under R.R. 4:88 without prior exhaustion of the available administrative appeal to the Division of Tax Appeals; R.R. 4:88-14 must consequently be applied to dismiss their actions unless there is a manifest showing that the interests of justice require otherwise. No such showing appears and indeed, all the pertinent considerations seem to us to point to the contrary. See *Delaware, Lackawanna and Western R. R. Co.* v. *Neeld, supra,* 23 N. J. at 575; *D., L. & W. R. Co.* v. *City of Hoboken,* 10 N. J. 418, 424 (1952).

The Director found that the factual proofs before him were insufficient to establish any illegal discrimination within the principles expressed in *Delaware, Lackawanna and Western R. R. Co.* v. *Neeld, supra.* Accordingly he assessed the Class II properties at true value and his assessment, subject to upsettal on review, is entitled to the presumption of correctness. See *D., L. & W. R. R. Co.* v. *City of Hoboken,* 16 N. J. Super. 543, 549 (App. Div. 1951), *rev'd on other grounds,* 10 N. J. 418 (1952). The railroads may, of course, have his assessment reviewed on appeal to the Division of Tax Appeals and such appeal has in fact been taken. The authority of the Division to correct the assessment if it is excessive or if there has been illegal discrimination is clear. R.S. 54:29A-33; *Gibraltar Corrugated Paper Co.* v. *North Bergen Tp.,* 20 N. J. 213 (1955). The burden of introducing adequate valuation and other relevant testimony to establish excessive assessment or illegal discrimination will justly rest on the railroads for in this respect their situation does not differ from the ordinary appealing taxpayer who carries a similar burden. In view of the highly specialized nature of the agency involved and the factual issues presented, the rule requiring exhaustion of administrative remedies seems to be patently applicable. See *Delaware, Lackawanna and Western R. R. Co.* v. *Neeld, supra,* 23 N. J. at 575:

> "And it is a corollary of the foregoing that the particular issue is peculiarly within the province of the administrative tribunals; and there is no occasion for

> judicial intervention before the exhaustion of the administrative remedies. They are wholly adequate, and the normal course in the circumstances. There is no discernible consideration of justice demanding that the administrative agencies be ousted of the jurisdiction for which they are specially fitted. The adjudicative function of the Division Director is established. The inquiry now concerns agency expertness and discretion, in the main. See *Nolan* v. *Fitzpatrick*, 9 N. J. 477 (1952); *Ward* v. *Keenan*, 3 N. J. 298 (1949); *Swede* v. *City of Clifton*, 22 N. J. 303 (1956)."

In their brief the railroads cite *Baldwin Const. Co.* v. *Essex County Bd. of Taxation*, 16 N. J. 329 (1954) as a "prime example" of taxpayers being permitted to obtain judicial relief from discriminatory assessments without exhausting their administrative remedies. There the lower courts had retained jurisdiction because they doubted or denied that the administrative tribunals had any jurisdiction to remedy the discriminatory assessments by reducing them to a common level of assessment below true value. See 28 N. J. Super. 110 (App. Div. 1953); 24 N. J. Super. 252 (Law Div. 1952). On appeal we determined the merits without passing upon the exhaustion-of-remedies doctrine or the extent of the jurisdiction of the administrative tribunals. Thereafter we held, in an opinion by Justice Burling (*Gibraltar Corrugated Paper Co.* v. *North Bergen Tp., supra*), that the Division of Tax Appeals has the statutory power and duty to remedy a discriminatory assessment by reducing it to the common level of assessment below true value. The stated justification for the lower courts' retention of jurisdiction in *Baldwin* has thus been removed and its holding furnishes no current support for the railroads' position here. Similarly we find nothing in the railroads' citation of ***Delaware, Lackawanna and Western R. R. Co.* v. *Neeld, supra*,** to aid their contention that the exhaustion-of-remedies doctrine should not be invoked; the pertinent language in that opinion, quoted earlier, points entirely the other way. There the Director had disavowed his legal power and obligation to correct an unconstitutionally discriminatory assessment by reducing it to the common level of assessment below true value; this Court declared that he had such power and obligation and remanded the cause, significantly, not to the lower court but to the Director for further proceedings in conformity with the principles declared by the Court. Here the Director has not disavowed his legal power and obligation but, recognizing the principles announced by the Court, found the proofs of discrimination insufficient. Assuming, as the railroads stress (citing *Orrok* v. *Parmigiani*, 32 N. J. Super. 70, 74 (App. Div. 1954)), that their complaints in the Law Division are at this preliminary stage to be viewed sympathetically as asserting a proper claim of unconstitutional discrimination, they are still required to exhaust their pending appeal in the Division of Tax Appeals where testimony may be taken and their claim may justly be determined on the full record made there. If they obtain a decision in the Division which they consider favorable no further action on their part may be necessary; if, on the other hand, they consider themselves aggrieved by its decision they may then readily obtain judicial review on appeal to the Appellate Division in accordance with R.R. 4:88-8. See *Werner Machine Co.* v. *Director of Division of Taxation*, 17 N. J. 121 (1954); *Fifth St. Pier Corp.* v. *City of Hoboken*, 22 N. J. 326 (1956).

The appellants raise a final procedural point which requires mention. They assert that, wholly apart from the doctrine of exhaustion of administrative remedies, judicial review of determinations by State administrative agencies or agents, such as the Director of the Division of Taxation, should be by appeal to the Appellate Division under R.R. 4:88-8 rather than as, in the instant matter, by complaint in the Law Division under R.R. 4:88-2. We consider their position to be sound although under R.R. 1:27(D) the litigant's choice of the wrong division will result in transfer and not in dismissal, at least where his judicial proceeding was originally instituted within the applicable time limitation. See *Mathews* v. *Finley*, 46 N. J. Super. 175, 177 (App. Div. 1957), *cert. denied*, 25 N. J. 283 (1957). Under former practice persons aggrieved by action or inaction of State and local administrative agencies could seek judicial relief by applying for one of the prerogative writs—*certiorari*, *mandamus*, *quo warranto* and prohibition. See *Harris, Pleading and Practice in New Jersey* 713 (Rev. ed. 1939); 1 *Bradner, New Jersey Law Practice* §§ 528, 612, 634, 635 (1940). *Cf. McKenna* v. *N. J. Highway Authority*, 19 N. J. 270, 274 (1955). Litigants occasionally lost their just claims by choice of the wrong writs and this and other phases of the prerogative writ practice caused widespread dissatisfaction. See *Ward* v. *Keenan, supra*, 3 N. J. at 303. The writs were effectively superseded by the Constitution of 1947 which provided that, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court "on terms and in the manner provided by rules of the Supreme Court". N. J. Const. art. VI, sec. 5, par. 4 (1947).

In 1948 this Court adopted its implementing Rules which sought to avoid the problems of the prerogative writ practice and to provide simple and expeditious modes of judicial review from administrative action and inaction. The Rules perpetuated none of the former procedural distinctions resting on the nature of the relief sought and their wholesome design was clear; they contemplated that every proceeding to review the action or inaction of a *local* administrative agency would be by complaint in the Law Division (R.R. 4:88-2; see *Baldwin Constr. Co.* v. *Essex Co. Bd. Taxation,* 27 N. J. Super. 240, 242 (App. Div. 1953)) and that every proceeding to review the action or inaction of a *State* administrative agency would be by appeal to the Appellate Division. See R.R. 4:88-8, 10 *Mathews* v. *Finley, supra; Petrucelli* v. *Dept. of Civil Service of N. J.*, 28 N. J. Super. 572 (App. Div. 1953). *Cf. McBride* v. *McCorkle*, 44 N. J. Super. 468, 473 (App. Div. 1957); *In re Adinolfi*, 43 N. J. Super. 262 (Law Div. 1957). It is true, as the railroads point out, that in *Delaware, Lackawanna and Western R. R. Co.* v. *Neeld, supra,* the initial proceeding for judicial review was in fact instituted by complaint in the Law Division rather than by appeal to the Appellate Division. But nothing in this Court's opinion in that case may fairly be said to furnish any general support for that course of procedure which we now disapprove. See *DeFazio* v. *Haven Savings and Loan Ass'n*, 22 N. J. 511 (1956). *Cf. Borough of Jamesburg* v. *Hubbs*, 6 N. J. 578 (1951); *Jersey City* v. *Tiene*, 29 N. J. Super. 172 (App. Div. 1953).

Reversed, with direction that the complaints in the Law Division be dismissed in order that the appeals of the railroads now pending before the Division of Tax Appeals may proceed with reasonable promptitude.

## *Appendix A*

# Concurring Opinion of the Supreme Court of New Jersey (A-62 September Term, 1957)

Heher, J., concurring:

I concur in the judgment of reversal and in the reasoning as well. But I do not join in the disposition of the "final procedural point" relating to judicial review of "determinations by State administrative agencies or agents." This is wholly unnecessary to the decision here, and therefore *obiter dictum* in the constitutional field of appellate jurisdiction and procedure that, in the interest of sound judicial administration, should await a cause in which the questions are directly involved and essential to the determination of the issues raised.

There are certain basic preconditions to the exercise of appellate jurisdiction. The Appellate Division of the Superior Court is endowed with the appellate function and, as in the case of this Court, "such original jurisdiction as may be necessary for the complete determination of any cause on review." 1947 *Constitution*, Article VI, section V, paragraph 3. Appeals may be taken to the Appellate Division "from the Law and Chancery Divisions of the Superior Court, the County Courts and in such other causes as may be provided by law." *Ibid.* Article VI, section V, paragraph 2. And subject to rules of this Court, the Law Division and the Chancery Division of the Superior Court "shall each exercise the powers and functions of the other division when the ends of justice so require and legal and equitable relief shall be granted in any cause so that the matters in controversy between the parties may be completely determined." *Ibid.* Article VI, section III, paragraph 4.

There are certain basic prerequisites to the exercise of appellate jurisdiction. The appeal is taken by the service and filing of a notice of appeal, as prescribed by R.R. 1:2-8; 4:88-8; and the appeal must be timely to invest the appellate tribunal with jurisdiction. *State* v. *Janiec,* 6 N. J. 608 (1951), cert. den. 341 U. S. 955, 71 S. Ct. 1007, 95 L. ed. 1376 (1951). And see *Reconstruction Finance Corporation* v. *Prudence Securities Advisory Group,* 311 U. S. 579, 61 S. Ct. 331, 85 L. ed. 364 (1941).

The common reciprocal jurisdiction thus given the Law and Chancery divisions of the Superior Court was primarily designed to secure a complete determination of "all matters in controversy between the parties * * *." But this does not have reference to appeals, the exclusive province of the Appellate Division of the Court; and so it would seem that R.R. 1:27D is not concerned with appeals. The concluding clause of the rule, "* * * and the action or cause shall then be proceeded upon as if it had been originally commenced in the proper court," makes clear its intended scope and purpose. Certainly, no one would contend that a judgment of the Law Division or the Chancery Division of the Superior Court is transferable to the Appellate Division for review without the intervention of the appellate process.

Simplicity in procedure has its appeal. But informality cannot be allowed to set at naught the basic requirements of procedural due process for the security of persons and property or constitutional principle and policy to that end.

There is no occasion now to review the considerations of policy underlying the conditions made a *sine que non* to the exercise of the appellate function. I would suggest the prudence of reserving the question for fuller examination in a case in which the point in its various facets may be directly involved and essential to the decision.

I would add that the extraordinary jurisdiction formerly exercised by the prerogative writs is now vested in the

Superior Court, to be afforded "* * * as of right, except in criminal causes * * *;" and the relief sought by the railroads here was in the nature of *mandamus* to compel the Director to determine the issue of equality *vel non* by the employment of the assessment ratios contained in the 1956 Table of Equalized Valuations.

R.R. 4:88-8 concerns only the "final decision or action" of a "state administrative agency;" and R.R. 4:88-14 provides that, save where required in the "interests of justice," proceedings under Rule 4:88 "shall not be maintainable, so long as there is available judicial review to a county court or inferior tribunal or administrative review to an administrative agency or tribunal which has not been exhausted."

# Appendix B

## Mandate of the Supreme Court of New Jersey

Appeal Docket No. 2492

◆

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Plaintiff-Respondent,

*vs.*

AARON K. NEELD, Director, Division of Taxation, etc.,
Defendant,

*and*

CITY OF JERSEY CITY,
Defendant-Appellant.

◆

### MANDATE ON REVERSAL

This cause having been duly argued before this Court by Messrs. Leo Rosenblum and Herbert H. Fine, counsel for the appellants and Messrs. Raymond J. Lamb, Joseph C. Glavin and Augustus Nasmith, counsel for the respondents, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court, Law Division, is in all things reversed, set aside and for nothing holden, with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record and proceedings be remitted to the said Superior Court, Law Division, to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the seventeenth day of February, 1958.

JOHN H. GILDEA,
Clerk of the Supreme Court.

FILED:
Feb. 17, 1958,

John H. Gildea,
Clerk.

## Appendix C

### Decision of Judge Knight on the Defendants' Motion to Strike the Complaint

(May 24, 1957)

I'll give you a short time if there is anything to add to those arguments.

Mr. Lamb: We have nothing to add.

The Court: Well, the Court determines that the motion for summary judgment should be denied.

In the notice of motion for summary judgment the grounds advanced by the defendants, namely, number one, the complaint does not state a claim upon which relief should be granted in this Court. I think that the case of the D. L. and W. Railroad, which was decided by the Supreme Court disposes of that ground.

Number two, plaintiff has not exhausted its administrative remedies and, therefore, is not entitled to invoke the jurisdiction of this Court. That is not in the Court's opinion what was determined by the Supreme Court in the D. L. and W. case.

Number three, the issues raised involving substantially the same subject matter as the suit brought by this plaintiff against these same defendants on March 6, 1957. These suits were dismissed with prejudice by order and judgment of this Court, dated March 13, 1957, on motion of these defendants for failure to exhaust administrative remedies, which determination is dispositive of the issues raised by the present complaint res judicata thereof. The other case was not res judicata. The facts are entirely different in the Court's opinion. Therefore, the motion is denied.

# Appendix D

## Findings and Conclusions of the New Jersey Department of the Treasury, Division of Taxation

◆

In The Matter of The Assessment
of Class II Railroad
Property For The Tax Year 1957

◆

### On Review of Primary Valuations

Under the provisions of the "railroad tax law of 1948" (N.J.S.A. 54:29A-1 *et seq.*) it is the duty of the director of the division of taxation to assess all property in railroad use in this State.

With respect to the tax year 1957, the director, on November 14, 1956 completed his valuation of all classes of property used for railroad purposes and delivered a detailed statement thereof to the taxpayers involved, pursuant to N.J.S.A. 54:29A-17.

On November 30, 1956, again pursuant to N.J.S.A. 54:29A-17, the director certified the value of all Class II property in each taxing district to the assessors in the several taxing districts in which such property is situate.

Pursuant to N.J.S.A. 54:29A-18, a number of railroad companies and taxing districts filed petitions for review, claiming that error had been made in the director's valuations. The director conducted hearings upon such petitions and reviewed the valuations of which such petitions complained.

Among other grounds, it was contended on behalf of the petitioning railroads that the director's valuations were discriminatory in that Class II railroad property was assessed either at full true value or in excess thereof, whereas other real property in the respective districts in which such railroad property is situate was assessed at less than full true value. To correct this alleged discrimination, the petitioning railroads urged that the director's valuations of Class II railroad property should be reduced to the level of assessment of other real property in the respective taxing districts and in doing so the director should apply the average assessment ratios of such districts as shown on the 1956 State Table of Equalized Valuations (N.J.S.A. 54:1-35.1).

On behalf of the petitioning taxing districts it was contended that:

(a) the director's valuations were below true value;

(b) the director is required by statute to assess Class II railroad property at full true value; and

(c) even if the director's duty is to assess Class II railroad property at the level of assessment of other real property in the respective taxing districts, he cannot use, for such purpose, the average assessment ratios shown in the 1956 State Table of Equalized Valuations since such ratios do not represent the common level of assessment within the respective districts.

At no time during the hearings before the director was any proof adduced to show the common level of assessment prevailing with respect to real property in the several taxing districts involved.

On March 11, 1957 the New Jersey Supreme Court in the case of *Delaware, Lackawanna and Western Railroad Company* v. *A. K. Neeld, et als.*, ruled that:

(a) the director was empowered and required, under N.J.S.A. 54:29A-18, to correct his initial valuations and to make his final assessment of Class II railroad property at the common level of assessment prevailing in the respective taxing districts even though such common level of assessment be at less than full true value; and

(b) the average assessment ratio shown on the director's Table of Equalized Valuations is not synonymous with and does not represent the common level of assessment in the district.

On March 5, 1957 several of the taxpayer railroad companies instituted proceedings in the Superior Court seeking, among other relief, to restrain the director from certifying his Class II railroad valuations to the several county boards of taxation on or before March 15, 1957, as required under N.J.S.A. 54:29A-18. On March 13, 1957, the Superior Court denied the application for restraint and dismissed the proceedings.

The director is required by law to certify his Class II railroad property valuations to the several county tax boards on or before March 15. The critical question to be decided is whether the record before the director has established by competent proof the fact of discrimination and the common level of assessment in the affected taxing districts.

As observed by the Supreme Court, discrimination is a question of fact. The petitioning railroads, relying exclusively on the assessment ratios in the 1956 Table of Equalized Valuations, presented no proof in support of their claim that the assessments on Class II railroad property were discriminatory. Similarly, as already observed, there has been no proof whatsoever introduced in these proceedings from which the director could determine the common level of assessment in any taxing district. Nor are there yardsticks presently available to the director from which he can make such a determination. It may be added that the petitioning taxing districts, likewise, have presented no proof either as to the true value of Class II railroad property or as to the common level of assessment prevailing in such districts.

If it were permissible to use the average assessment ratios as established in the 1956 Table of Equalized Valuations for the purpose of adjusting Class II railroad property valuations to the common level of assessment within the respective taxing districts, it might be possible to correct the certifications within the time limited by law, provided, of course, that discrimination is deemed to exist. However, the Supreme Court has expressly ruled that the average assessment ratios shown on the Table of Equalized Valuations are not representative of the common level of assessment of a taxing district.

But above and beyond the strict legal considerations involved, practical considerations of the utmost gravity have now intervened which make immediate certification imperative. The certification of assessed valuations of Class II railroad property to the county boards of taxation, involving, as it does, 438 taxing districts, is indispensable to

(a) the apportionment of costs of county government;

(b) the apportionment of costs of regional, consolidated and joint school districts; and

(c) the striking of the general tax rate of each taxing district.

Therefore, any extended delay in the certification of these valuations will result in serious impairment of the normal assessment and collection procedures throughout the State. In fact, if there is extended delay, every municipality in the State, even those in which there is no Class II railroad property, will be confronted with serious fiscal problems.

The certification of Class II valuations on a full true valuation basis will not result in irreparable damage to any of the petitioning railroads. Under N.J.S.A. 54:29A-31, et seq., full opportunity is afforded to them through appeal to the Division of Tax Appeals to obtain redress from any discrimination which may result.

For all of the foregoing reasons, it has been concluded that the director has no alternative but to certify forthwith his valuations of Class II railroad property to the respective county boards of taxation, as required by law, on the only basis presently feasible, namely, full true value.

Dated: March 15, 1957.

/s/ Aaron K. Neeld,
Aaron K. Neeld,
Director, Division of Taxation.

# Appendix E

## Opinion of the Supreme Court of New Jersey
## (No. A-63, September Term, 1957)

◆

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
a corporation of the State of New Jersey,
Plaintiff-Appellant,
*vs.*

AARON K. NEELD, Director, Division of Taxation, *et als.*,
Defendants-Respondents.

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THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD
COMPANY, a corporation,
Plaintiff-Appellant,
*vs.*

AARON K. NEELD, Director, Division of Taxation, *et als.*,
Defendants-Respondents.

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ERIE RAILROAD COMPANY, a corporation of the
State of New York,
Plaintiff-Appellant,
*vs.*

AARON K. NEELD, Director, Division of Taxation, *et als.*,
Defendants-Respondents.

## *Appendix E*

Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania,

Plaintiff-Appellant,

*vs.*

Aaron K. Neeld, Director, Division of Taxation, *et als.*,

Defendants-Respondents.

◆

Argued January 7, 1958; decided

Messrs. Joseph C. Glavin, Augustus Nasmith and Raymond J. Lamb argued the causes for the appellants (Messrs. Emory, Langan, Lamb & Blake, Attorneys for plaintiffs-appellants, Erie Railroad Company and Lehigh Valley Railroad Company).

Messrs. Herbert H. Fine and Leo Rosenblum argued the causes for the respondents (Mr. Ezra L. Nolan, Corporation Counsel of the City of Jersey City, Attorney for defendant-respondent City of Jersey City and Mr. James Rosen, Attorney for defendant-respondent Township of Weehawken).

The opinion of the Court was delivered by
Jacobs, J.

These are four consolidated appeals from judgments of the Law Division dismissing, without prejudice, the complaints filed by the plaintiff railroad companies. Appeals were taken to the Appellate Division and we certified on our own motion.

In March 1953 the Director, Division of Taxation in the Department of the Treasury, certified his assessments against the plaintiff railroads' properties in the defendant municipalities. The railroads, contending that their properties had been assessed in excess of true value and that their Class II properties had been assessed above the common standards or levels of valuations used by the municipalities, appealed to the Division of Tax Appeals in accordance with *R.S.* 54:29A-31. The municipalities, contending that the Class II properties had been assessed below true value, also appealed to the Division of Tax Appeals in accordance with *R.S.* 54:29A-31. In 1954, 1955 and 1956 similar appeals from the Director's assessments were taken to the Division of Tax Appeals by the railroads and the municipalities. Although some of the appeals have been decided, most of them still await hearing and determination by the Division of Tax Appeals. Under the principles announced this day in *The Central Railroad Company of New Jersey* v. *Neeld*, —— N. J. —— (1958) the railroads must generally first exhaust their statutory appeals in the Division of Tax Appeals and may, thereafter, obtain judicial review in the Appellate Division pursuant to *R.R.* 4:88-8. However, in the instant matter the railroads urge that in view of the Division's delay in hearing their appeals, the Law Division would be justified in entertaining and adjudicating their complaints without awaiting any further action in the Division. The relief they seek is to have the Law Division take immediate jurisdiction over the railroad tax controversies relating to the assessments for 1953-56 inclusive and actually determine the true value of their properties and the common level or ratio of assessed to true value of the locally assessed properties. That the granting of such relief would indeed be extraordinary may readily be gathered from pertinent judicial opinions such as *D. L. & W. R. Co.* v. *City of Hoboken*, 10 N. J. 418, 424 (1952) where the cause was remanded to the Division of Tax Appeals with the following comments:

*Appendix E*

"Our review of the record persuades us that the cases must be remanded to the Division of Tax Appeals for further proceedings. There is a fatal defect in the record. The parties have not had the benefit of findings of fact by the Division of Tax Appeals as required by *R.S.* 54:2-16. The deficiency was not remedied in the Appellate Division by an independent determination by that court of the basic facts and the making of its own assessments based thereon. However, we have held that usually the better appellate practice in cases presenting complex questions of value such as this is not to exercise the power conferred by Article VI, Section V, paragraph 3 of the Constitution of 1947 and Rule 3:81-13 independently to review the facts and make the assessment. *City of Newark* v. *West Milford Tp., Passaic County*, 9 N. J. 295, 301 (1952). Appellate courts should not inject themselves into the field of original valuation in such cases except in very exceptional circumstances. *Cf. Kendrick Coal & Dock Co.* v. *Com'r. of Internal Revenue*, 29 F. 2d 559 (C. C. A. 8, 1928). The valuation of property in railroad use particularly presents 'highly technical' problems for experts. *Long Dock Co.* v. *State Board of Tax Assessors*, 86 N. J. L. 592 (E. & A. 1914), *reversing Long Dock Co.* v. *Hendrickson*, 85 N. J. L. 536 (Sup. Ct. 1914). The coordination and evaluation of such expert evidence is often a matter of considerable difficulty because of the unique problems entailed in the valuation of properties in railroad use and the increment in value, if any, resulting from the assemblage and consolidation of several tracts, *Pennsylvania Railroad Co.* v. *Jersey City*, 98 N. J. L. 283 (E. & A. 1922). The task of coordination and evaluation of such evidence has been expressly com-

> mitted by the Legislature to the Division of Tax Appeals, a body contemplated to bring an informed judgment from specialized experience to the nice balancing and ultimate resolution of the many complex factors involved."

The complaints contained various allegations designed to establish that there have been extended delays in the disposition of railroad tax appeals in the Division. Thus they assert that since 1953 there have been 101 appeals relating to Class II railroad tax properties only seven of which were heard and finally disposed of by the Division; that no date has been set for hearing on any of the plaintiffs' appeals from the assessments for 1953-56 inclusive; and that "under the present calendar and methods of procedure in the Division, there is no prospect that any of said causes will be reached for hearing in the foreseeable future." But there were representations (not disputed by the railroads at the oral argument) that the Division has actually taken steps to bring the tax appeals of the railroads on for hearing and determination. Thus in an affidavit dated June 21, 1957 the secretary of the Division asserted that on May 20, 1957 the Division announced in the presence of the attorneys for the railroads, that "a pre-trial of all the railroad tax appeals presently pending before the Division of Tax Appeals" would be held on June 28, 1957, and that "at least two panels of the Division of Tax Appeals would devote their time to railroad tax appeals, starting with September 4, 1957, and sitting, with the exception of certain dates, such as meetings of the Division, from day to day." And in an affidavit dat November 4, 1957 he stated that on June 28, 1957 a p trial was held and that at that time it was announced tha two panels of the Division would start hearing railroad tax appeals on September 4, 1957; that on September 4, 1957 two panels of the Division sat at Jersey City to call their respective lists of causes and to start hearings; that one panel after calling its list announced that hearings on the Pennsylvania Railroad appeals would be continued, and they are currently being held; that the other panel called its list on September 4, 1957 and requests were then made by the attorneys of record for adjournments in Case No. 1, *New York Central Railroad* v. *Director, Division of Taxation*, Case No. 2, *Town of West New York* v. *Director, Division of Taxation, and New York Central Railroad*, and Case No. 3, *Township of North Bergen* v. *Director, Division of Taxation, and New York Central Railroad;* and that since these appeals were not ready for hearing it was necessary to start hearings upon Case No. 4, *The Reading Company* v. *Director, Division of Taxation*, in which case, after some proof had been taken, an adjournment was granted at the request of the attorney for The Reading Company.

The plaintiff railroads do not suggest that they have ever made any formal applications to the Division for early determination of their appeals or that the Division has discriminated against them in arranging its calendars for the hearing of appeals. Indeed they do not now request or seek any judicial relief in lieu of mandamus to compel the Division to hear them expeditiously and proceed to decision. See *Matter of Mandamus in the case of Prickett*, 20 N. J. L. 134, 135 (Sup. Ct. 1843); *Switz* v. *Middletown Twp.*, 23 N. J. 580, 587 (1957). *Cf. Schirmer* v. *Cockrill*, 223 Ark. 817, 269 S. W. 2d 300 (1954); *State* v. *Biggs*, 198 Ore. 413, 255 P. 2d 1055 (1953). On the contrary, their prayer is that the trial court now exercise the function of correcting excessive and discriminatory assessments—a function which *R.S.* 54:29A:33 vests in the Division of Tax

Appeals rather than in the courts. There undoubtedly have been regrettable delays in the hearing of the railroad tax appeals but, as hereinbefore indicated, some alleviative measures have recently been taken and, now that attention has been focused on the problem, additional steps may be forthcoming. See *Assembly Bill No. A 97* (1958). *Cf. Report, New Jersey State Bar Association, Committee on Taxation,* 80 NJLJ 565 (1957); *Editorial, Tax Appeals, Newark Evening News,* January 30, 1958, p. 12. In any event it seems clear to us that the matter may not justly be dealt with by having the courts, upon the limited showing made, now displace the Division of Tax Appeals in the highly specialized function of evaluating and assessing railroad properties throughout the State.

Delay has always plagued the administration of justice in our country. As early as 1839 David Dudley Field referred to speedy justice in his state as a "thing unknown", and as late as 1956 Herbert Brownell, Jr. referred to delay in federal and state litigation as a "chronic shortcoming". See *Nims, The Law's Delay: The Bar's Most Urgent Problem,* 44 *ABAJ* 27 (1958); *Proceedings of the Attorney General's Conference on Court Congestion and Delay in Litigation* (1956). Since the adoption of our Constitution of 1947 much has indeed been done in our State to meet the problem. The efficient operation of our Court Rules relating to administration and practice has reduced radically the time lag between the institution and termination of litigation; and although we now compare most favorably with other jurisdictions the attainable goal is further reduction of the time lag consistent with the interests of justice. But since administrative agencies are not generally subject to the Rules governing our Courts (*Mulhearn* v. *Federal Shipbuilding and Dry Dock Co.,* 2 N. J. 356 (1949)), it is the executive and legislative branches of government which must be charged with the important responsibility of taking effective steps towards the early removal of delays in all administrative proceedings. *Cf. In re Greenville Bus Co.,* 17 N. J. 131, 147 (1954):

> "The original application by the Greenville Bus Company was submitted early in 1952 and the final decision was rendered in June 1954. The many administrative hearings were held weeks and even months apart and they were sometimes devoted to extensive and repetitious or undisputed oral testimony which might well have been reduced by advance stipulations entered into under board guidance. A major reason for the tremendous growth of the administrative process was the belief that the judicial process was unduly rigid, slow and expensive. Since the adoption of our Constitution of 1947 our courts have done much towards the elimination of the grounds underlying this belief. The procedures in the instant matter would no longer be tolerated in our courts and it seems ironic that far-reaching administrative agencies continue to follow them. See *Abbotts Dairies, Inc.* v. *Armstrong, supra,* 14 N. J. at page 332.

Professor Davis points to the unfortunate fact that many administrative proceedings are now slower than comparable judicial proceedings. *Davis, Administrative Law* 294, 295 (1951). He refers to a study of ordinary complaint and answer cases in the Interstate Commerce Commission which shows that the shortest time from complaint to decision was 344 days, the longest 1847 days and the average 622 days; and he cites many long delayed decisions in the National Labor Relations Board with the following comment:

*Appendix E*

> "Substantive rights are sometimes seriously impaired by delay, and the question has often come to reviewing courts, especially in NLRB cases, whether the result is denial of due process. When proceedings in one case 'unfortunately' had taken two and a half years, the Supreme Court refused to shorten the period of compensation for back pay, but declared: 'Handling of complaints as quickly as is consistent with good administration is of course essential. It is important both to the employer, who may have to pay back wages, and to the employee, who must live without his job.' Even when the Board did not hear a case for four years and made no decision until a year after hearing, the court deemed itself powerless to intervene."

See also *American Mut. Liability Ins. Co.* v. *McDonough*, 61 F. 2d 558, 563 (7th Cir. 1932), *cert. den.* 288 U. S. 602, 77 L. Ed. 977 (1933). Justice demands that administrative agencies always remain alert to the need for prompt decisions on their part and where their personnel and facilities appear insufficient to meet their workloads they should, through apropriate channels, seek corrective action. In proper cases judicial relief may be obtained to compel them to proceed to early hearing and decision but that is a far cry from the suggested course of having the courts take over their highly specialized work in the event they delay. That course would tend to discard the legislative policies which brought about the expert administrative agencies and might well strip our judicial system of the important gains it has made.

The railroads place reliance on *Smith* v. *Illinois Bell Teleph. Co.*, 270 U. S. 587, 70 L. Ed. 747 (1926) where the Court, without awaiting final administrative action, enjoined the Illinois Commerce Commission from enforcing a schedule of rates alleged to be confiscatory. There the plaintiff Telephone Company's predecessor had filed a schedule of rates but before approval the plaintiff filed a second schedule. The Commission approved the first schedule and suspended the effective date of the second schedule. On appeal to the Circuit Court of Peoria County the Commission's action was reversed and the cause was remanded for further proceedings. Hearings were held in 1922 and an application for a temporary schedule pending final determination was denied. In 1923 the plaintiff called the Commission's attention to the delay in deciding the cause and to the fact that revenues fell short of meeting expenses and requested the Commission to set the cause for an early hearing. The request was ignored and in 1924 the plaintiff filed its injunction complaint in the Federal District Court alleging that the Commission had failed and refused to determine the issues in the cause or to determine whether the rates in the second schedule were just and reasonable and, alleging further, that the rates in the first schedule not only did not yield a fair return but were insufficient to pay operating expenses. After a motion to dismiss the complaint was denied the Commission refused to plead further and an injunction was thereupon granted. In its affirmance the United States Supreme Court, through Justice Sutherland, had this to say:

> "It thus appears that, following the decree of the state court reversing the permanent order in respect of the second schedule and directing further proceeding, the commission for a period of two years, remained practically dormant; and nothing in the circumstances suggests that it had any intention of going further with the matter. For this apparent neglect on the part of the commission, no reason or excuse has been given;

> and it is just to say that, without explanation, its conduct evinces an entire lack of that acute appreciation of justice which should characterize a tribunal charged with the delicate and important duty of regulating the rates of a public utility with fairness to its patrons but with a hand quick to preserve it from confiscation. Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them; and where, in that respect, such a state of facts is disclosed as we have here, the injured public service company is not required indefinitely to await a decision of the rate-making tribunal before applying to a Federal court for equitable relief."

Unlike the situation in the *Smith* case the plaintiff railroads never made any application to the Division to expedite their causes and the Division has taken steps towards bringing them on for hearing. Furthermore, the railroads do not here present any constitutional issue of confiscation resulting from continued operation without fair return. If it should ultimately be determined that they have paid excess taxes for the years in question, they will readily obtain credits on later taxes payable by them. See *R.S.* 54:29A-49. And while it may be true that they will have lost interest which they might have earned on such excess payments, that is a common incident in the complex administration of our tax laws which would not justify the exceptional relief sought here by the railroads.

We agree fully with the action of Justice (then Judge) Francis in dismissing the complaints filed by the plaintiff railroad companies and the judgments entered in the Law Division are accordingly:

Affirmed.

# Appendix F

## Complaint in Action of The Delaware, Lackawanna and Western Railroad Company, etc. *v.* Aaron K. Neeld, Director, etc., *et al.* (Docket No. L-8677-56)*

(Filed—May 7, 1957)

Plaintiff, The Delaware, Lackawanna and Western Railroad Company, a corporation of the Commonwealth of Pennsylvania, having an office and place of business in the State of New Jersey at the Lackawanna Terminal Building, Hoboken, New Jersey, says:

1. The Delaware, Lackawanna and Western Railroad Company (hereinafter referred to as "Lackawanna") is the owner of certain lands and premises located in the City of Jersey City, the City of Hoboken and the City of Newark (hereinafter referred to as "Jersey City", "Hoboken" and "Newark"), which were used by it for railroad purposes as of all of the various assessments dates hereinafter mentioned.

2. At all times hereinafter mentioned, Lackawanna was and now is engaged in the business of operating a railroad in the State of New Jersey and elsewhere. Such of the property, real and personal, as is and has been used for railroad purposes in New Jersey, is and has been subject to taxation by the defendant, Aaron K. Neeld, Director, Division of Taxation and his predecessors in said office (hereinafter referred to as "Director"), under the provisions of the railroad tax law of 1948 (N.J.S.A. 54:29A-1 et seq.) (hereinafter referred to as "tax law").

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* The title of this case will hereafter be designated throughout this appendix as "D. L. & W. Action".

3. Defendant, Aaron K. Neeld, is the duly appointed and acting Director, Division of Taxation of New Jersey.

4. Defendant, City of Jersey City, is a duly created and existing municipal corporation of the State of New Jersey.

5. Defendant, City of Hoboken, is a duly created and existing municipal corporation of the State of New Jersey.

6. Defendant, City of Newark, is a duly created and existing municipal corporation of the State of New Jersey.

7. Said municipalities did not assess local real property at true value for the tax years 1953, 1954 and 1955.

8. Defendant, Division of Tax Appeals (hereinafter referred to as "Division"), is a duly created administrative agency of the State of New Jersey.

9. For the tax year 1953 Director determined what he believed to be the true value of Lackawanna's property used for railroad purposes in New Jersey as of January 1, 1952, under the tax law and delivered a detailed statement thereof to Lackawanna on or about December 10, 1952.

10. Thereafter, on or about the second Monday in January, 1953, Lackawanna filed a petition for review of said preliminary valuations with the Director, in which it contended, among other things, that its properties of all classes were assessed at valuations in excess of true value and that it was being discriminated against and deprived of its property without due process of law because its Class II lands in Jersey City and Hoboken were being assessed by the Director at valuations in excess of true value, while locally assessable properties in Jersey City and Ho-

boken were being assessed on the basis of a standard of value which was considerably below true value.

11. Hearings were conducted by the Director on said petition for review, but the Director took the position that Lackawanna's properties were assessable and were assessed at true value and that he had no right to assess the same on the basis of any other or lower standard of valuation. He, therefore, on or about March 15, 1953, made a determination and final valuations which were substantially unchanged from his preliminary valuation. Annexed hereto and made a part hereof as "Exhibit A" is a schedule containing a description of each of the parcels of Class I lands owned and used by Lackawanna for railroad purposes in Jersey City, the area of each parcel in acres, the final assessment for the tax year 1953 levied against each parcel by the Director, and Lackawanna's contended true value of each said parcel. Annexed hereto and made a part hereof as "Exhibit B", is a schedule containing a description of each of the parcels of Class II lands owned and used by Lackawanna for railroad purposes in Jersey City, the area of each parcel in acres, the final assessment for the year 1953 levied against each parcel by the Director, and Lackawanna's contended true value of each of said parcel. Annexed hereto and made a part hereof as "Exhibit C" and "D" are similar schedules of Class I and Class II lands owned and used by Lackawanna for railroad purposes in Hoboken.

12. Lackawanna, on or about the third Monday in May, 1953, filed a complaint in the Division, after having served a copy thereof five or more days before said filing, upon Jersey City, Hoboken and the Attorney General of New Jersey (hereinafter referred to as "Attorney General").

By said complaint, Lackawanna sought to have the said assessments against its said properties reduced to the true value of said properties. It further sought to have the assessments against its said Class II properties in Jersey City and Hoboken further reduced to the same standard of valuations that were used by Jersey City and Hoboken in the assessment of locally assessed properties for 1953.

13. For the tax years 1954 and 1955, the Director determined the alleged true value of Lackawanna's properties used for railroad purposes in New Jersey as of January 1, 1953 and January 1, 1954, under the tax law, and delivered a detailed statement thereof to Lackawanna on or about December 10th of each of said years.

14. Thereafter, on or about the second Monday in January, 1954 and 1955, Lackawanna filed a petition for review of said preliminary valuations with the Director, in which it contended, among other things, that its properties located in Jersey City and Hoboken were assessed at valuations in excess of true value and that it was discriminated against and deprived of its property without due process of law because its Class II properties were being assessed by the Director at valuations in excess of true value, while locally assessable properties in Jersey City and Hoboken were being assessed on the basis of standards of valuations which were considerably below true value.

15. Hearings were conducted by the Director on said petitions for review, but the Director took the position that Lackawanna's properties were assessable and were assessed at true value and that he had no right to assess the same at any other or lower standard of value. He, therefor, on or about March 15, 1954 and March 15, 1955, made his determination and final valuations which were

substantially unchanged from his preliminary valuations. Exhibits "A" and "B" contain a description of each of the parcels of Class I and Class II lands owned and used by Lackawanna for railroad purposes in Jersey City, the area of each parcel in acres, the final assessment for the tax years 1954 and 1955 levied against each parcel by the Director, and Lackawanna's contended true value of each of said parcels; Exhibits "C" and "D" contain similar information for Class I and Class II lands owned and used by Lackawanna in Hoboken.

16. Lackawanna, on or about the third Monday in May, 1954 filed a complaint in the Division, after having served a copy thereof five or more days before said filing, upon Jersey City and Hoboken and the Attorney General, by which complaints it sought to have the said assessments against its Class I and Class II properties used for railroad purposes in New Jersey reduced to the true value of said properties for the tax year 1954. It further sought to have the assessments against its Class II properties located in Jersey City and Hoboken further reduced to the same standard of valuation that was used by Jersey City and Hoboken in the assessment of locally assessed property for said year 1954.

17. Lackawanna, on or about the third Monday in May, 1955 filed a complaint in the Division, after having served a copy thereof five or more days before said filing, upon Jersey City, Hoboken, Newark and the Attorney General, by which complaints it sought to have the said assessments against its Class I and Class II properties used for railroad purposes reduced to the true value of said properties for the tax year 1955. It further sought to have the assessments against its Class II properties located in Jersey

City, Hoboken and Newark further reduced to the standard of valuation that was used by Jersey City, Hoboken and Newark in the assessment of locally assessed property for said year 1955.

18. For the tax year 1955 the Director had determined what he believed to be the true value of Lackawanna's property used for railroad purposes in Newark as of January 1, 1954, and neither Newark nor Lackawanna filed a petition for review of said preliminary valuations by the Director. Annexed hereto and made a part hereof as "Exhibit E" and "Exhibit F" are schedules containing a description of the parcels of Class I and Class II lands owned and used by Lackawanna for railroad purposes in Newark. Each of said schedules shows the area in acres of each parcel, the final assessment for the tax year 1955 levied against each parcel by the Director and Lackawanna's contended true value of each of said parcel.

19. Lackawanna, on or about December 1, 1953, 1954 and 1955 paid the taxes that were assessed against it by the Director for the years 1953, 1954 and 1955, respectively. Said taxes were paid in full by Lackawanna because under the provisions of the tax law, Lackawanna would have been liable for interest on any unpaid balance of taxes ultimately determined to be due at the rate of 1% per month from the due date of said taxes to the date of payment.

20. All of said causes have been pending before the Division since the date of the filing of the respective complaints. No date has been set for the hearing on any of said appeals. Under the present calendar and methods of procedure in the Division, there is no prospect that any of

said causes will be reached for hearing in the foreseeable future.

21. For the tax years 1953, 1954 and 1955 and 1956, appeals from assessments made by the Director against properties of various railroads operated in New Jersey were filed with the Division by the Pennsylvania Railroad Company (hereinafter referred to as "Pennsylvania") with respect to its properties in Jersey City, Hoboken, Camden and Secaucus; Lehigh Valley Railroad Company (hereinafter referred to as "Lehigh") with respect to its properties located in Jersey City; Central Railroad Company of New Jersey (hereinafter referred to as "Central") with respect to its properties located in Jersey City; Erie Railroad Company (hereinafter referred to as "Erie") with respect to its properties in Jersey City and New York Central Railroad Company (hereinafter referred to as "New York Central"), with respect to its properties in Weehawken. For the tax years 1954, 1955, and 1956, New York Central also complained about the assessments against its properties in North Bergen. For the tax year 1956 New York Central also complained about the assessments against its properties in West New York. For the tax years 1954 and 1955 Erie also complained about the assessments against its properties in Hoboken and Weehawken, and for the tax year 1956 in addition complained about the assessments against its properties in Secaucus.

22. For said tax years 1953, 1954, 1955 and 1956, separate appeals were filed with the Division by Jersey City, with respect to the Class II properties located in Jersey City, of the Pennsylvania, Central, Lehigh, Erie and Lackawanna, whereby Jersey City sought to have the assess-

ments against Class II properties increased to what it contended was the true value thereof.

23. For said tax years 1953, 1954, 1955 and 1956, separate appeals were filed with the Division by the City of Hoboken with respect to the Class II properties in said taxing district of Lackawanna, Pennsylvania and Erie.

24. For said tax years 1953, 1954, 1955 and 1956, separate appeals were filed with the Division by the Township of Weehawken, with respect to the Class II properties in said taxing district owned by Erie.

25. For said tax year 1956, appeals were filed by the Township of North Bergen (hereinafter referred to as "North Bergen"), with respect to the Class II properties in said taxing district owned by New York Central and Pennsylvania.

26. For said tax years 1953, 1954, 1955 and 1956, separate appeals were filed by the Township of Secaucus with respect to the Class II properties in said taxing district of Pennsylvania, Lackawanna and Erie.

27. The Division has only heard and disposed of the following of the above mentioned cases:

(a) Appeals of Secaucus for the year 1953 relating to Class II properties of Pennsylvania, Lackawanna and Erie in said taxing district.

(b) Appeals of Erie, Weehawken and Hoboken relating to assessments levied against Erie Class II properties in Weehawken and Hoboken for the tax year 1953.

28. In September, 1954, Division referred the hearing of the 1953 and 1954 appeals of Pennsylvania and Jersey City relating to the Class II properties of Pennsylvania in Jersey City to a Panel composed of Commissioners Labrecque and Weiner. Hearings were conducted before said Panel on 37 separate days between November 18, 1954 and February 24, 1956. The issues presented in said cases were divided into three separate categories:

1) True Value of Class II Structures

2) Discrimination

3) True Value of Class II Lands

The hearings conducted between November 1954 and February 1956 related solely to the true value of Class II structures. At the close of the hearing on February 24, 1956, the Panel directed Counsel for Jersey City to file a brief in support of Jersey City's contentions, within thirty days from said date. It directed counsel for Pennsylvania to file his answering brief within thirty days from the service upon him of Jersey City's brief. The Panel indicated at that time that it intended to make a determination of the true value of Pennsylvania's Class II structures before it heard any testimony on the other two issues. Jersey City did not file its brief until April 12, 1957, a year after it was due, and as a consequence, Pennsylvania has been unable to file an answering brief. No time has been set for the commencement of the taking of testimony on the issues of discrimination or land valuations.

29. Plaintiff has no way of knowing when and if a day for the hearing of testimony on said two issues will be set, but plaintiff asserts, on the basis of the foregoing and following recitations of the history of railroad tax cases

before the Division, that there is no reasonable prospect that the appeals relating to the railroad properties of Lackawanna will be heard within the foreseeable future:

(a) Homer Zink, former Director, Division of Taxation, made a study of the waterfront terminal properties of all of the railroads having terminals on the Hudson River and New York Bay in the counties of Hudson and Bergen during several years prior to the tax year 1949. After completing said study, Director Zink reduced the valuations of the lands in said railroad terminals by varying percentages for the tax year 1949.

(b) Appeals were filed with the Division from said final valuations for 1949 by Central Lehigh, Erie, Lackawanna and New York Central and also by Jersey City and Hoboken.

(c) Similar assessments were made by the Director for the tax years 1950, 1951 and 1952 with respect to all of the aforementioned railroads and similar appeals were filed for said tax years by all of the aforementioned railroads and municipalities with respect to said Class II assessments levied by the Director for said years.

(d) The Division, on October 25, 1949, referred the appeals of Lackawanna, Jersey City and Hoboken, relating to the assessment of Lackawanna properties for the tax year 1949 to a Panel composed of Commissioners Kraemer, Weiner and Erickson. Hearings on said appeals were held between November 21, 1949 and April 20, 1950. The Panel filed its report on October 10, 1950 and on November 30, 1950 judgments were entered under which the decreases in the valuations of Lackawanna's Class II property made by the Director for the tax year 1949 were set aside.

(e) Appeals were taken from the judgments of the Division to the Superior Court of New Jersey, Appellate Division, which affirmed the judgments of the Division. Appeals were taken from the judgments of the Appellate Division to the Supreme Court of New Jersey. The Supreme Court, by a mandate dated October 20, 1952, reversed the judgments of the Appellate Division and remanded the cases back to the Division for further proceedings.

(f) Between April 20, 1950, the last date upon which testimony was taken before the Division, and October 20, 1952, no hearings were had on any appeals relating to Class II railroad properties. When the appeals relating to Lackawanna properties were remanded to the Division for further proceedings, the calander of the Division was so far behind there was little prospect of the Division's being able to hear and decide said pending cases, the parties concerned, because of that and other facts, were impelled to settle their differences and, as a consequence, consent judgments were entered before the Division in all Class II railroad appeals relating to waterfront railroad terminal properties in Jersey City and Hoboken for the tax years 1949 to 1952, inclusive.

(g) During the period from May, 1949 to date approximately 175 appeals relating to Class II railroad properties have been filed with the Division. During said period the Division has only heard and finally disposed of 25 cases, or approximately 14% of such cases relating to assessments levied by the Director under the Tax Law that have come before it for consideration during said period.

(h) During the period from May, 1953 to date, 101 appeals relating to Class II railroad properties have been filed with the Division. These appeals involved properties having a total assessed valuation of approximately $420,000,000. The Division has only heard and finally disposed of 7 cases, or 7% of the cases relating to assessments levied by the Director under the Tax Law that have come before it for consideration during said period.

30. For the tax year 1953

(a) Director determined that the true value of Lackawanna's Class II lands in Jersey City was $13,680,468. He assessed Class II taxes against Lackawanna for 1953 on the basis of said valuation, totalling $1,019,058.06. While he levied his assessment for 1953 against Lackawanna's Class II properties on the basis of true value, as he determined it, the common ratio of assessed to true value of locally assessed property in Jersey City for the year 1953 was 56.02%.

(b) Director determined that the true value of Lackawanna's Class II lands in Hoboken was $4,838,348. He assessed Class II taxes against Lackawanna for 1953 on the basis of said valuation, totalling $378,856.79. While he levied his assessments for 1953 against Lackawanna's Class II properties on the basis of true value, as he determined it, the common ratio of assessed to true value of locally assessed property in Hoboken for the year 1953 was approximately 56%.

31. Article 8, Section 1, Paragraph 1 of the Constitution of New Jersey—1947 provides as follows:

> "Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed ac-

> cording to the same standard of value, and such real property shall be taxed at the general tax rate of the taxing district in which the property is situate for the use of such taxing district."

All Class II taxes assessed by the Director are allotted and paid to the taxing districts in which the said properties are located. Therefore, Director deprived Lackawanna of its property without due process of law and deprived it of equal protection of the law when he assessed Lackawanna's Class II properties located in the taxing districts of Jersey City and Hoboken at or above 100% of true value while all locally assessed real property in Jersey City and Hoboken was being assessed at less than true value and at a common level or ratio of assessment of 56.02% and 56%, respectively.

32. Lackawanna was compelled to pay to the Treasurer of New Jersey on December 1, 1953 $614,878.72 in excess of the amount of money that was legally due from it for its Class II properties that were located in Jersey City and Hoboken.

33. For the tax year 1954

(a) Director determined that the true value of Lackawanna's Class II lands in Jersey City was $13,680,468. He assessed Class II taxes against Lackawanna for 1954 on the basis of said valuations totalling $1,153,537.06. While he levied his assessments for 1954 against Lackawanna's Class II properties in Jersey City on the basis of true value as he determined it, the common level or ratio of assessed to true value of locally assessed property in Jersey City for the year 1954 was approximately 67.45%.

(b) For the tax year 1954 Director determined that the true value of Lackawanna's Class II lands in Hoboken was $4,838,348. He assessed Class II taxes against Lackawanna for 1954 on the basis of said valuation totalling $496,164.51. While he levied his assessments for 1954 against Lackawanna's Class II properties on the basis of true value, as he determined it, the common level or ratio of assessed to true value of locally assessed property in Hoboken for the year 1954 was approximately 56%.

34. Therefore Director deprived Lackawanna of its property without due process of law and deprived it of equal protection of the law when he assessed Lackawanna's Class II properties located in the taxing districts of Jersey City and Hoboken at or above 100% of true value while all locally assessed properties in Jersey City and Hoboken were being assessed at less than true value and in Jersey City at a common level or ratio of assessed to true value of approximately 67.45% and in Hoboken of approximately 56%.

35. Lackawanna was compelled to pay to the Treasurer of New Jersey on December 1, 1954 $549,788.69 in excess of the amount of money that was legally due from it for its Class II properties located in Jersey City and Hoboken.

36. For the tax year 1955

(a) Director determined that the true value of Lackawanna's Class II properties in Jersey City was $13,680,468. He assessed Class II taxes against Lackawanna for 1955 on the basis of said valuations totalling $1,149,980.14. While he levied his assessments for 1955 against Lackawanna's Class II properties on the basis of true value, as he determined it, the common level or ratio of assessed to true value of locally assessed property in Jersey City for the year 1955 was approximately 62.61%.

(b) Director determined that the true value of Lackawanna's Class II lands in Hoboken was $4,838,348. He assessed Class II taxes against Lackawanna for 1955 on the basis of said valuations totalling $388,912.18. While he levied his assessments for 1955 against Lackawanna's Class II properties on the basis of true value, as he determined it, the common level or ratio of assessed to true value of locally assessed property in Hoboken for the tax year 1955 was approximately 70.8%.

(c) Director determined that the true value of Lackawanna's Class II lands in Newark was $320,194. He assessed Class II taxes against Lackawanna for 1955 on the basis of said valuations totalling $24,617.46. While he levied his assessments for 1955 against Lackawanna's Class II properties on the basis of true value, as he determined it, the common level or ratio of assessed to true value of locally assessed properties in Newark for the year 1955 was approximately 56%.

37. Therefore Director deprived Lackawanna of its property without due process of law and deprived it of equal protection of the law when he assessed Lackawanna's Class II properties located in the taxing districts of Jersey City, Hoboken and Newark at or above 100% of true value while all locally assessed properties in Jersey City, Hoboken and Newark were being assessed at less than true value and at a common level of assessment in Jersey City of approximately 62.61%; in Hoboken of approximately 70.8% and in Newark of approximately 56%.

38. Lackawanna was compelled to pay to the Treasurer of New Jersey on December 1, 1955 $554,371.60 in excess of the amount of money that was legally due from it for its Class II lands located in Jersey City, Hoboken and Newark.

39. Lackawanna will be further deprived of its property without due process of law by reason of the fact that it was compelled to pay said taxes assessed for the years 1953, 1954 and 1955 in order to avoid the imposition of a penalty against it at the rate of 1% per month, whereas, when, as and if said taxes are determined to have been improperly assessed against it, Lackawanna will only be entitled to receive credit for the overpayment against the taxes next legally due from it without any interest or other compensation for the use of its money.

40. The Class II assessments levied by the Director against the lands listed in Exhibits B, D, and F, annexed hereto, for the tax years 1953, 1954 and 1955 are illegal, unlawful, discriminatory and unconstitutional for the following reasons:

(a) They deny Lackawanna the equal protection of the laws of the State of New Jersey and discriminate against Lackawanna within the meaning of Article 1, Paragraph 1 of the Constitution of New Jersey, 1947, because said valuations for assessments are made on a basis of a standard of value in excess of true value, while other real properties located in the taxing districts of Jersey City, Hoboken and Newark were valued, assessed and taxed during the years more particularly referred to *supra* on standards of value considerably below the true value of said locally assessed properties.

(b) They deprive Lackawanna of its property without due process of law; they deny Lackawanna the equal protection of the laws and they discriminate against Lackawanna within the meaning of the Fourteenth Amendment to the Constitution of the United States in that said valuations for assessment are made on the basis of a standard of value in excess of true value, while other properties located in the taxing districts of Jersey City, Hoboken and Newark which were locally assessed, were valued for assessment during each of the years more particularly referred to *supra* on standards of value considerably below the true value of locally assessed properties.

(c) The imposition of taxes based on said illegal, unlawful, discriminatory and unconstitutional valuations for assessment constitutes an unlawful interference with and an undue burden upon interstate commerce in violation of Article 1, Section 8 of the Constitution of the United States which gives Congress the power to regulate commerce among the several states.

41. The valuations for assessment made by the Director for the tax years 1953, 1954 and 1955 against the several parcels of Class I and Class II lands more particularly described in Exhibits "A" to "F" annexed hereto are illegal and unlawful because they exceed the true value of said properties. Therefore said valuations for assessment and the taxes imposed thereon are contrary to the provision of the Railroad Tax Law for 1948, R.S. 54:29A-1 *et seq.* as amended, by which properties used for railroad purposes are required to be assessed at true value.

42. No administrative remedy which is adequate and effective is available for the plaintiff and the interests of

justice require that this action should be maintained under R.R. 4:88-14 for the following reasons:

(a) The assessments against Lackawanna's properties are in violation of applicable statutes and constitutional provisions.

(b) The records show that plaintiff's remedy before the Division is non-existent, there not being any prospect of a hearing on any of the pending appeals within the foreseeable future.

(c) Plaintiff is further being deprived of its property without due process of law by reason of the fact that discriminatory taxes are assessed against it annually and it is required to pay said taxes in full in order to avoid having to pay penalty interest at the rate of 12% per annum on any underpayment of said taxes; whereas if said taxes are determined to be excessive, plaintiff only will be entitled to credit, without interest against next taxes due from it to the State of New Jersey.

(d) The maintenance of this action will avoid prosecution of separate proceedings in administrative review for each year before the Division with excessive and unnecessary costs incident thereto.

(e) The Court has jurisdiction and power to determine all questions of law and fact by R.S. 54:29A-37 and to fix and determine the correct amount of plaintiff's assessments and taxes.

(f) A speedy determination of the questions in issue is in the public interest because the amount of taxes involved is so great that if the questions are permitted to remain undetermined for a long period of years and it is ultimately determined that the plaintiff and other railroads are entitled to refunds the amount of said refunds accumulated over a long period years might have the effect of bankrupting the municipalities effected whereas, if the question is determined promptly such a situation will be averted.

Wherefore, plaintiff, The Delaware, Lackawanna and Western Railroad Company, demands judgment as follows:

1. That this Honorable Court will assume jurisdiction over the controversy set forth in this complaint and will stay any action by the Division of Tax Appeals with respect to the complaints filed therein by plaintiff and Jersey City, Hoboken and Newark relating to the assessments levied by the Director against Lackawanna's Class I and Class II properties used for railroad purposes in New Jersey for the tax years 1953 to 1955 inclusive.

2. That this Honorable Court will determine the true value as of January 1, 1952 and January 1, 1953 of the properties listed on Exhibits A, B, C and D annexed hereto, and as of January 1, 1954 of the properties listed on Exhibits E and F annexed hereto.

3. That this Honorable Court will determine the common level or ratio of assessed to true value of the locally assessed properties in Jersey City for each of the tax years 1953, 1954 and 1955, and having determined said common level or ratio, it will apply the said ratios to the true values ascertained for the properties listed on Exhibits A and B, annexed hereto; and that it will reduce the taxes assessed against Lackawanna for each of said years in accordance with such determinations.

4. That this Honorable Court will determine the common level or ratio of assessed to true value of the locally assessed properties in Hoboken for each of the tax years 1953, 1954 and 1955, and having determined said common level or ratio, it will apply the said ratios to the true value ascertained for the properties listed on Exhibits C and D, annexed hereto; and that it will reduce the taxes assessed against Lackawanna for each of said years, in accordance with its said determination.

5. That this Honorable Court will determine the common level or ratio of the true value of the locally assessed properties in Newark for the tax year 1955, and having determined said common level or ratio, it will apply said ratio to the true value ascertained for the properties listed on Exhibits E and F, annexed hereto; and that it will reduce the taxes assessed against Lackawanna for 1955 in accordance with its said determination.

6. That this Honorable Court will afford plaintiff such other and further relief as may seem just in the premises.

Respectfully submitted,

Augustus Nasmith
Attorney for Plaintiff
Room 234
115 Observer Highway
Hoboken, New Jersey

* * *

# Appendix G

## Opinion of the Supreme Court of New Jersey (23 N. J. 561)

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, PLAINTIFF-RESPONDENT, v. AARON K. NEELD, DIRECTOR, DIVISION OF TAXATION IN THE DEPARTMENT OF THE TREASURY, STATE OF NEW JERSEY, CITY OF HOBOKEN, CITY OF JERSEY CITY, CITY OF NEWARK AND TOWN OF SECAUCUS, DEFENDANTS-APPELLANTS.

Argued October 29, 1956—Decided March 11, 1957.

On certified appeal from the Law Division to the Appellate Division of the Superior Court.

*Mr. John F. Crane,* Deputy Attorney-General, argued the cause for the appellant Aaron K. Neeld, Director, Division of Taxation (*Mr. Grover C. Richman, Jr.,* Attorney-General, attorney).

*Mr. Herbert H. Fine* argued the cause for the appellant City of Hoboken.

*Mr. Leo Rosenblum* argued the cause for the appellant City of Jersey City (*Mr. James A. Tumulty, Jr.,* Corporation Counsel, attorney).

*Mr. Augustus Nasmith* argued the cause for respondent.

*Mr. Vincent P. Torppey,* Corporation Counsel, and *Mr. Edward A. Smarak* joined in the brief as attorneys, respectively, for the City of Newark and Town of Secaucus.

*Mr. James Rosen,* by leave of court, submitted a brief on behalf of the Township of Weehawken, as *amicus curiae.*

The opinion of the court was delivered by

HEHER, J. In purported compliance with the mandate of *L.* 1952, *c.* 229, *N.J.S.A.* 54:29A-17, the defendant Director of the State Division of Taxation, some time prior to December 10, 1955, determined the "true value" of Class II railroad property of the plaintiff Delaware, Lackawanna and Western Railroad Company situate in the cities of Hoboken, Jersey City and Newark and the Town of Secaucus, as of January 1, 1955, for the assessment of the 1956 tax; and the valuations were later sustained by the Director after hearing held under *N.J.S.A.* 54:29*A*-18 pursuant to petitions for review interposed by Lackawanna and the several defendant municipalities.

Lackawanna's petition for review charged that the assessments at true value were "excessive" and "not according to the same standard of value" governing the assessment of other real property within the municipality, and the municipalities severally complained in their petitions that the valuations of Lackawanna's Class II real property were below true value.

In addition to the assessing function, the Director is required, *L.* 1954, *c.* 86, *N.J.S.A.* 54:1-35.1, on or before October first in each year, to promulgate a "table of equalized valuations to be used in the calculation and apportionment of distributions pursuant to the State School Aid Act of 1954," *N.J.S.A.* 18:10-29.30 to 18:10-29.48. "True value" for the purposes of the act, *L.* 1954, *c.* 86, *N.J.S.A.* 54:1-35.3, "shall be deemed to be valuation at current market prices or values, determined in such manner as the director may, in his discretion, select"; and he is directed to "determine the ratio of aggregate assessed to aggregate true valuation of real estate of each taxing district"; and he "may make such determination by reference to the county equalization table whenever he is satisfied that the table has been prepared according to accepted methods and practices and * * * it properly reflects true value or a known percentage thereof for the several taxing districts in the county," and "with respect to any and all taxing districts, may use assessment ratios reported in the Sixth Report of the Commission on State Tax Policy (Trenton, 1953)" and "consider such other assessment ratio studies as may be available"; and he "may make such further and different investigations of assessment practices as he may deem necessary or desirable for the establishment of the assessment ratios required by this act."

The equalization table promulgated by the Director October 1, 1955, pursuant to this statute, as adjusted January 6, 1956 by the Division of Tax Appeals, certifies the "average" ratios of assessed to true value in the given municipalities: Hoboken, 70.80%; Jersey City, 62.61%; Newark, 52.51%; Secaucus, 30.54%. These ratios were determined by an analysis of sales of real property in the several taxing districts between July 1, 1954 and June 30, 1955, related to the assessments made by the local assessing authority.

At a hearing of the petition for review involving Lackawanna's Jersey City property, held January 18, 1956, the Director declared, in response to questions put by counsel, that he had assessed Lackawanna's Class II property in Jersey City "at true value on the basis of the best information available to us for the purpose of determining assessments at true value"; that he conceived it to be his duty to "assess Class II railroad property according to full true value," and he was not at liberty to "apply the average ratio as promulgated in [his] Table of Equalized Valuations for 1955, either the original figures or the corrected figures," and relief from "any alleged discriminatory assessment which may result by the application of that general principle" could come only from the "Division of Tax Appeals or the court." And he said that "we will not apply those ratios * * * to any railroad in any taxing district."

And thereupon, January 20, 1956, before the time had arrived for the scheduled hearings concerning the assessments made in the other municipalities, this action was begun by the filing of a complaint, in which Hoboken, Jersey City, Newark and Secaucus were joined with the Director as defendants, alleging that the Director had failed in the performance of his duty to assess Lackawanna's Class II real property within the several municipalities "* * * according to the same standard of value and according to the common ratio employed in levying assessments * * *," and thus the assessment "at true value" constituted undue discrimination in violation of the 1947 State Constitution, *Article* VIII, *Section* I, *paragraph* 1, and the Federal Constitution as well, and seeking judgment affirming and declaring the Director's "power and duty to make his initial valuations, to determine and correct his initial valuations and to make his final assessment" of Class II railroad property, for the purpose of assessing the 1956 tax, "according to the average ratio of assessed to true value employed in levying assessments on other real property located within" the respective municipalities, and "at less than true value, when necessary to prevent discrimination," and commanding the Director to "make his final assessment" in the several municipalities according to the ratios given in his promulgated equalization table.

The complaint was later amended to include a count charging the intentional assessment of real property within the defendant municipalities contrary to *R.S.* 54:4-1.

All defendants moved for summary judgment upon these grounds: (a) the Director has no jurisdiction to assess Class II railroad property at less than true value; and (b) Lackawanna had not exhausted its administrative remedies, Lackawanna countered with a motion to amend the complaint as indicated *supra,* and for summary judgment upon the ground that there was no "genuine issue of fact as to any material fact," and it was entitled to prevail as a matter of law. Defendants' motion was denied; and the cross-motion was granted.

The judgment affirms that "there are no essential facts in dispute"; that the Division Director "has the power and duty to determine and correct his initial valuations and to make his final assessment" of Class II real property "according to the average ratio of assessed to true value employed in levying assessments on other real property located within [the] defendant municipalities," and "at less than true value, when necessary to prevent discrimination," and the refusal so to do contravened the cited provision of the 1947 State Constitution and the Fourteenth Amendment, and enjoins the Director to act accordingly and to make the "final assessment" of the given property "at the average ratio of assessed to true value" in the several municipalities "as he has already determined exists with respect to other real estate" in these taxing districts, "and as set forth in the Table of Equalization Valuations promulgated" by the Director October 1, 1955, pursuant to *N.J.S.A.* 54:1-35.1 *et seq.*, "as corrected by the Division of Tax Appeals," *i.e.*, according to the percentages of true value in each such municipality set forth *ante*.

The case is here by our certification of the joint appeal taken by the defendant Division Director and the four municipalities.

It is assigned for error that the Director "has no authority under the statute or the Constitution to assess second-class railroad property at less than what he conceives to be its true value"; that "(d)iscrimination is a question of fact and this issue should not have been determined by summary judgment"; that the "sales analysis is permissible only for the aggregate study required to be made in connection with the distribution of state school funds," and "true value" cannot be found "merely by a study of sales"; and the action should be dismissed for failure to exhaust the administrative remedy.

The argument *contra* is that the "constitutional mandates require and *R.S.* 54:29A-18 authorizes the Director to assess Class II railroad property at less than true value when necessary to prevent discrimination," citing *Baldwin Construction Co. v. Essex County Board of Taxation,* 16 *N. J.* 329 (1954); that the "uncontroverted facts established discrimination by the Director, as a matter of law," and "there were no genuine issues as to the material facts," and "there was no adequate administrative remedy"; and, finally, that the "Director's ratios were conclusive upon him as a matter of law," and Lackawanna "is entitled to reduction to the common ratio found by the Director."

[1] The Director's reviewing jurisdiction under *L.* 1948, *c.* 40, *N.J.S.A.* 54:29A-18, comprehends the correction of undue discrimination by reducing his own assessment to less than true value where necessary to achieve the equality of treatment and burden secured by constitutional precept. "Any taxpayer * * * claiming that error has been made in the [Director's] valuation may * * *" have a review of the "valuations," and the Director is enjoined to hold a hearing accordingly and to "review the valuations" of which complaint is made, and "make his determination thereon and correct the same as shall appear just * * *."

[2] All real property and tangible goods and chattels are subject to taxation at true value. This, by force of *R.S.* 54:4-1, as amended, derived from a measure implementing in terms the amendment to the 1844 Constitution adopted

in 1875, *Article* IV, *Section* VII, *paragraph* 12, ordaining that property be assessed for taxes "under general laws, and by uniform rules, according to its true value." The 1947 Constitution, *Article* VIII, *Section* I, *paragraph* 1, modified the terms of the formula: "Property" is required to be assessed for taxation "under general laws and by uniform rules"; and "All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value," and "taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district." Yet the basic concept is the same.

[3, 4] As said in *Baldwin*, the dominant principle of the new constitutional mandate is equality of treatment and burden; and this was of the essence of the old constitional provision as well. The standard of true value is but a means of achieving uniformity and equality, the predominant consideration in the distribution of the tax burden in virtue of the basic guaranties of due process and the equal protection of the laws. Were the rule of the State Constitution radically different in attribute and quality, the Fourteenth Amendment would prevail, for the equality of treatment thereby secured protects the individual from state action making for discriminatory imposts "not imposed on others of the same class"; and the constitutional requirement "is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class." *Hillsborough Township v. Cromwell,* 326 *U. S.* 620, 66 *S. Ct.* 445, 90 *L. Ed.* 358 (1946).

[5, 6] Where one or a few of a class of taxpayers are assessed at the full true value of their property, according to a constitutional or statutory mandate, and the rest of the class are intentionally assessed at a percentage of true value, in violation of the law, the "right of the taxpayer whose property alone is taxed at 100% of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirements of the statute"; where "it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law." *Sioux City Bridge Co.* v. *Dakota County,* 260 *U. S.* 441, 43 *S. Ct.* 190, 67 *L. Ed.* 340, 28 *A. L. R.* 979 (1923). See also *Iowa-Des Moines National Bank v. Bennett,* 284 *U. S.* 239, 52 *S. Ct.* 133, 76 *L. Ed.* 265 (1931); *Cumberland Coal Co. v. Board of Revision,* 284 *U. S.* 23, 52 *S. Ct.* 48, 76 *L. Ed.* 146 (1931).

*R.S.* 54:3-13, whose source was *L.* 1906, *c.* 120, enjoins the county board of taxation to "secure the taxation of all property * * * at its true value, in order that all [taxable] property * * * shall bear its full, equal and just share of taxes." Here we have the animating principle of equality of burden.

[7] But mathematical precision in the valuation of property for taxation is not requisite, nor is it attainable. Absolute equality is impractical. The design of the equal portection clause of the Fourteenth Amendment, related to the particular field, is protection against intentional systematic discrimination, and thus to insure the essence of the basic right of equality; mere errors of judgment are not enough; there "must be something more,—something which, in effect, amounts to an intentional violation of the

essential principle of practical uniformity." *Sunday Lake Iron Co. v. Wakefield Township,* 247 *U. S.* 350, 38 *S. Ct.* 495, 62 *L. Ed.* 1154 (1918); *Sioux City Bridge Co. v. Dakota County,* cited *supra.*

The ruling principle is embodied in *R.S.* 54:3-21, as amended by *L.* 1945, *c.* 125, providing for an appeal to the county board by a taxpayer "feeling aggrieved by the assessed valuation of his property, or feeling that he is discriminated against by the assessed valuation of other property in the county, or a taxing district which may feel discriminated against by the assessed valuation of property in the taxing district, or by the assessed valuation of property in another taxing district in the county, * * *," and in *R.S.* 54:4-46, 47, as amended by *L.* 1947, *c.* 413, empowering the county board, "after investigation," to "revise, correct and equalize the assessed value of all property in the respective taxing districts, increase or decrease the assessed value of any property not truly valued," assess omitted property "at its true value," and "in general do everything necessary for the taxation of all property in the county equally and at its true value."

In *Gibraltar Corrugated Paper Co. v. North Bergen Township,* 20 *N. J.* 213 (1955), we held that under *R.S.* 54:3-21, *R.S.* 54:2-35, and *R.S.* 54:2-39, all as amended, the county boards and the State Division of Tax Appeals have jurisdiction to remedy discriminatory assessments at the instance of the aggrieved taxpayer, by reducing the assessment, even though then at true value, to accord with the "common ratio employed in levying assessments throughout the same taxing district," and thus to fufill the principle of equality in treatment and burden, "which by virtue of its constitutional foundation must override the statutory standard where the latter has not been manifested in fact to achieve equality." Justice Burling said that the "fact of discrimination against a complainant taxpayer'' is within the competency of the state agencies, and ''cannot be erased for lack of a remedy whether it occurs above or below the true value standard''; ''* * * the taxing authorities may *equalize* assessments at a level below true value and, this being so, the same authorities must reduce *individual* assessments where equality can only be obtained at a point falling short of the statutory standard.''

And it was there pointed out that ''Equalization of the aggregates, although related by necessity to individual assessment, operates in a different mathematical sphere''; its ''purpose is to distribute the county burden equally among the taxing districts, and to achieve this it is first necessary to revise the individual aggregates submitted by the districts to a figure that will reflect a common ratio of 100% of true value,'' and whether the ''burden is then distributed upon a basis of 50% or 100% of true value will not undermine the requisite of equality, for equality has already been established according to the statutory direction so far as the districts within the county are concerned,'' referring to *R.S.* 54:3-17.

*R.S.* 54:3-17 directs that each county board of taxation shall annually ascertain and determine, ''according to its best knowledge and information,'' the ''general ratio or percentage of full value at which the real property of each taxing district is assessed according to the tax lists laid before the board,'' and prepare an ''equalization table'' showing the assessed valuation of the real property in each district, ''the ratio or percentage, if any, by which the assessed valuation should be increased or decreased in order to correspond to true value, and the true value of the real property within the district as determined by it''; and it was said in *Gibraltar* that although the ''equalization process does not work individual revision to true value,'' citing *Borough of Totowa v. Passaic County Board of Taxation,* 5 *N. J.* 454 (1950), "it is indicative of the legislative intent that equality is to be achieved though assessments fall below the standard required," and so the "statute itself reflects the rule of equality as a predominant factor," the principle approved in *Baldwin,* and a taxpayer "feeling discriminated against by the assessed valuation of other property in the district in comparison with his own assessment" may appeal to the county board, *R.S.* 54:3-21, as amended, and the board's judgments are reviewable by the Division of Tax Appeals, *R.S.* 54:2-35, as amended, or *R.S.* 54:2-39, as amended, the Division to "give such judgment therein as it may think proper."

The Director's statutory review, *N.J.S.A.* 54:29*A*-18, would be null were it bound by the "true value" standard in the exercise of the "corrective" process, even though such course would deny the taxpayer's constitutional right of uniformity and equality, the basic principle of the "true value" formula. Requiring adherence t the full value concept in the context would be a contradiction in terms, a construction repugnant to reason and logic. The quality of the remedial authority given to the Director and the appellate administrative tribunals to this end must needs be the same; otherwise, the proceeding would be in vain. The Director is enjoined to make such determination "as shall be just"; and the implicit meaning of this is accommodation to the standard followed by the local assessors where uniformity is imperative to achieve the constitutional equality of treatment and burden.

But Lackawanna's argument to sustain the judgment proceeds on the fundamental misconception that the sales-assessment ratios found by the Director for the apportionment of the moneys provided for state school aid under *N.J.S.A.* 54:1-35.1, are "competent proof in an individual discrimination case," and "conclusive upon him as a matter of law," citing *City of Passaic* v. *Passaic County Board of Taxation,* 18 *N. J.* 371 (1955).

There is an essential difference between a common or uniform assessment ratio of true value applicable to all alike in the same class and the "average" assessment ratio of true value. The "common" ratio imports general equality in the incidence of the tax, the equality of burden that is of the essence of constitutional uniformity; the "average" ratio is the arithmetical mean or median of varying ratios of true value, necessarily making for unequal proportions of value and thus for inequality of treatment and burden in the apportionment of the tax as between the several property owners. *Switz v. Township of Middletown,* this day decided, 24 *N. J.* 580 (1957).

[8] The sales-assessment ratio data do not provide the basis for an intra-municipal true value assessment of individual parcels of real property. As observed in *Switz,* Director Neeld has made abundantly clear the inherent probative limitations of this process in an article published in *New Jersey Municipalities,* January 1, 1956, "*The Gibraltar Case—Full True Value Assessments":* "Sales-assessment ratio data," he there affirmed, "are usable for two basic purposes: a—To test the quality of the assessment roll of a district, and b—To approximate the aggregate true value of real property within a district for various apportionment purposes," and "are not intended nor considered to be useful for the purpose of making full value assessments against specific parcels of real property"; since the result is merely an "average ratio of assessed to true value of all the properties on the roll which necessarily means that there are many with ratios far above and many with ratios below this average," and

while such data "will have value in aiding the administrative agencies to determine the existence of inequalities within a district, and may even assist the courts in dealing with cases involving alleged discrimination, nevertheless, such data cannot be employed as a substitute for the expertness, judgment and discretion required in formulating an original assessment for each parcel of property on a full true value basis."

The sales-assessment ratio data have been used for equalization by the aggregate method for the apportionment of county taxes among the municipalities, and the proportional distribution of state school aid. See *Gibraltar Corrugated Paper Co. v. North Bergen Township, supra; City of Passaic v. Passaic County Board of Taxation,* 18 *N. J.* 371 (1955); *Borough of Totowa v. Passaic County Board of Taxation, supra.* This has to do with the inter-municipal sharing of the county tax burden and state school benefits.

Yet this is not to say that sales-assessment data are conclusive of equalization for all such statutory purposes. As noted *ante, R. S.* 54:3-17 directs that the county board shall annually determine, "according to its best knowledge and information," the "general ratio or percentage of full value" at which the real property in each taxing district is assessed, and prepare an "equalization table" accordingly. The "general ratio" is the rate most common, that generally obtaining. But there is no occasion to pursue the inquiry here.

[9] And it is a corollary of the foregoing that the particular issue is peculiarly within the province of the administrative tribunals; and there is no occasion for judicial intervention before the exhaustion of the administrative remedies. They are wholly adequate, and the normal

course in the circumstances. There is no discernible consideration of justice demanding that the administrative agencies be ousted of the jurisdiction for which they are specially fitted. The adjudicative function of the Division Director is established. The inquiry now concerns agency expertness and discretion, in the main. See *Nolan v. Fitzpatrick,* 9 *N. J.* 477 (1952); *Ward v. Keenan,* 3 *N. J.* 298 (1949); *Swede v. City of Clifton,* 22 *N. J.* 303 (1956).

We reserve the question of interest for argument after the basic issue shall have been determined.

[10] The judment is affirmed insofar as it declares and adjudges the Director's jurisdiction to "correct his initial valuations, and to make his final assessment" of Lackawanna's Class II real property "at less than true value, when necessary to prevent discrimination," but is otherwise reversed, and the cause is accordingly remanded to the Director for further proceedings consistent with this opinion.

Vanderbilt, C. J. (concurring). I come to the same ultimate conclusion as the majority in this case because the present state of our law is that unlawful discrimination against a taxpayer may be remedied by the courts or by the proper administrative agency even though accomplished below the standard of true value prescribed by law and even though to do so it is necessary to disregard the statutory mandate requiring assessment at true value—all because we believe in the dominance of the fundamental principle of equality, *Baldwin Construction Co. v. Essex County Board of Taxation,* 16 *N. J.* 329 (1954); *Gibraltar Corrugated Paper Co. v. North Bergen Township,* 20 *N. J.* 213 (1955); see also *City of Passaic v. Passaic County Board of Taxation,* 18 *N. J.* 371 (1955). While it is nevertheless the law, I feel it necessary to indicate that so long as there are means by which uniformity of tax treatment and equality in the imposition of the tax burden can be achieved without sacrificing the statutory direction to assess all property at true value, every power must be exerted toward that end.

The fact that it has been necessary to effectuate a remedy in cases where at one particular stage strict compliance with the statutory mandate would work the evil sought to be avoided and would be contrary to the "just and ultimate purpose of the law," *Sioux City Bridge Co.* v. *Dakota County, supra,* 260 *U. S.* 441, 43 *S. Ct.* 190, 67 *L. Ed.* 340 (1923), is not to say that the continued and universal violation of the statutory command to assess at true value is to be condoned. On the contrary, as is now conceded by all of the members of this court, *Switz* v. *Township of Middletown,* 23 *N. J.* 580 (1957), the statutory scheme contemplates that equality of treatment and burden be accomplished by local and initial assessments at true value. Had this been the accomplished fact here, there would have been no need for the present proceedings.

We are rapidly approaching the point where concerted and intentional efforts to disregard the positive commands of our law will no longer be tolerated merely because time appears too short or the size of the task appears too great to remedy the situation, *Switz* v. *Township of Middletown, supra.* So long as the law remains in its present state, a system founded upon the existing statutory provisions must be enforced and *all* property assessed at the same standard of value—its true value.

VANDERBILT, C. J., and JACOBS, J., concurring in result.

*For affirmance and reversal*—Chief Justice VANDERBILT, and Justices HEHER, OLIPHANT, BURLING and JACOBS—5.

*For affirmance*—Justice WACHENFELD—1.

# Appendix H

## Opinion of the Supreme Court of New Jersey (A-53 September Term, 1956, reported in 23 N. J. 580)

◆

OLIVIA WRIGHTSON SWITZ,

Plaintiff-Respondent,

*vs.*

TOWNSHIP OF MIDDLETOWN, in the County of Monmouth, a municipal corporation, WILLIAM C. JOHNSON, Assessor of the Township of Middletown, and MONMOUTH COUNTY BOARD OF TAXATION,

Defendants-Appellants.

◆

Argued November 26, 1956; decided March 11, 1957.

On certified appeal from the Appellate Division of the Superior Court.

Mr. Lawrence A. Carton, Jr. argued the cause for the appellant Township of Middletown and William C. Johnson, Assessor. Messrs. Roberts, Pillsbury & Carton, Attorneys.

Mr. Herbert J. Hannoch argued the cause for the respondent. Mr. William S. Myers, of counsel. Messrs. Hannoch, Weinstein, Myers & Stern, Attorneys.

Mr. John F. Crane, Deputy Attorney General, argued the cause for the respondent Monmouth County Board of Taxation. Mr. Grover C. Richman, Jr., Attorney General, and Mr. Thomas P. Nolan, Deputy Attorney General, on the brief.

## *Appendix II*

The opinion of the court was delivered by
HEHER, *J.*

By summary judgment for the plaintiff entered in the Superior Court in this proceeding in lieu of the prerogative writ of *mandamus,* the defendant assessor of the Township of Middletown was directed to "value and assess" all taxable real property in the Township for the year 1957 and subsequent years "by uniform rules and according to the same standard of value, which standard shall be the full and fair value of ~~such re~~al property and at the price at which, in his judgment, such property would sell for at a fair and *bona fide* sale by private contract on October 1st of the preceding year;" and the defendant Monmouth County Board of Taxation was enjoined, "by May 1, 1956 in accordance with law, to investigate, revise, correct and equalize all assessments made" by the defendant assessor of taxable property in the Township of the tax year 1956 "and subsequent years" and, in particular to revise, correct and equalize all such assessments by "uniform rules and according" to the given standard of "full and fair value."

And the assessor was directed, in the event the County Board "should require him so to do," "in accordance with R.S.54:4-16 and other applicable statutes," to "make up and prepare corrected tax lists and duplicates for the tax year 1956 under the supervision of said Board, * * * in which corrected tax lists and duplicates he shall comply with the directions of said Board and shall value and assess all real property subject to taxation" in the Township by the same standard of "full and fair value."

The defendant Township was ordered to "appropriate in accordance with law, such monies as may reasonably be necessary and required by it and by" the defendant assessor "to comply with the foregoing."

## *Appendix II*

By way of cross-claim, the Township and the assessor alleged that on September 28, 1955 the Director of the Division of Taxation ,"in the further performance of his duties under *N.J.S.A.* 54:1-35.1, determined the average ratio of assessed value to true value of the real property in each of the other 51 municipalities in the County of Monmouth;" that the "percentages in each case were less than 100% of true value," and there was no appeal from this determination by any of the municipalities, and the time for appeal had expired; that the assessors of the other municipalities of the County "are now preparing or shortly will prepare and file" their respective real property assessment lists and tax duplicates for 1956, and in the event of judgment in accordance with the prayer of the complaint, "these defendants will be required to bear a disproportionate and excessive portion of the taxes and tax burden" of the County; and that "it is the duty" of the County Tax Board to investigate, revise, correct and equalize "all assessments in all taxing districts" in the County "so that all tax assessments are determined by uniform rules and according to the same standard of value, and annually to ascertain and determine, according to its best knowledge and information, the general ratio or percentage of full value at which the real property of each taxing district is assessed" and to "prepare an equalization table showing the assessed valuation of the real property in each district and the ratio or percentage by which the assessed valuation shall be increased or decreased in order to correspond to true value"; and there was a demand that if judgment be entered against the Township and the assessor in accordance with the complaint, the County Tax Board be ordered to "investigate, revise, correct and equalize" "all assessments made by the various assessors and assessing agencies of taxable property" in the several taxing districts of the County for 1956 and thereafter, "so that the valuation of real property in each district, as equalized, shall be determined to be the true valuation of such property in computing the total ratables of each district for all apportionments of County and State taxes for distribution of money."

The cross-claim was dismissed.

On defendant's joint appeal the Appellate Division, 40 *N. J. Super.* 217 (1956), affirmed the judgment, save as modified (a) "to relieve all parties of its mandate" for the year 1956; (b) to vacate the "mandatory order to compel fulfillment of the [county] board's statutory duty in the future;" and (c) to "show a dismissal" of the cross-claim "without prejudice."

We certified the judgment for appeal on defendants' motion.

It was stipulated in the trial division: (1) the defendant assessor had filed with the County Board of Taxation "his 1956 Tax List and Duplicate for the defendant Township," "prepared in accordance with the same general practice and procedure that was employed by said assessor for 1955 and prior years," and "In making such assessments" he "believed that he was following the practice of other tax assessors throughout the County and State;" (2) the "assessments therein contained are less than 100% of the full and fair value of the assessed properties as of October 1, 1955 and less than 100% of the prices at which the assessed properties would have sold for at a fair and *bona fide* sale by private contract on October 1, 1955;" and (3) on September 28, 1955, the Director of the Division of Taxation, "in the further performance of his duties under *N.J.S.A.* 54:1-35.1, *et seq.,* determined that the average ratio of assessed value to true value of the real property in the Township is 15.45%," as alleged in paragraph 10 of the complaint, and in his investigation resulting in this determination, the Director "considered 862 current sales of property made in said Township reported to him by the defendant assessor," "total amount of all such sales" being $9,268,-037, and "the total amount of the assessments upon the properties so sold," but $1,385,575, as alleged in paragraph 11 of the complaint, and these averments "are admitted with respect to the 1955 assessments, and the determinations of the Director [are] also generally applicable to the aforesaid 1956 assessment list."

The complaint also alleged: (1) the Sixth Report of the *Commission on State Tax Policy* "disclosed that residential property" in the Township "was assessed at 14% of true value," and "commercial and industrial property * * * at 18% of true value;" (2) the Director, in fixing the amount of school aid to which the Township was entitled, "had, on October 1, 1954, determined that real estate in the Township was being assessed at 16% of true value;" (3) the County Board, "in the performance of its duty to equalize 1955 assessments in the various separate taxing districts" of the County "had determined that for the year 1955 no change should be made in the assessments made by the defendant assessor;" and (4) 124 of the 862 current sales considered by the Director in his determination of September 28, 1955 represented sales of vacant land, and the 1955 assessments on such lands varied from 6.04% of the sales price to 80% thereof; 728 sales involved residences, and the 1955 assessments thereon varied from 3.08% of the sales price to 80%; 5 concerned farms, the assessment variation here being from 10.43% of the sales price to 35.16%, and 5 real estate of other classifications, the assessments varying from 10.10% of the sales price to 30.97%.

The complaint further declared that plaintiff's property was assessed at $31,000 for 1955, and had "all real property in the Township been assessed by uniform rules, then, by applying the Director's ratio of 15.45%, the true value of plaintiff's property would be in excess of $200,000;" that the property "was not worth such sum," and plaintiff "was the subject of discriminatory assessment" and was "being required to bear a disproportionate and excessive shares of the taxes and tax burden of the Township."

The appellants contend at the outset that the "mandatory judgment to compel assessment on a true value basis constitutes an abuse of legal discretion because such action is likely to operate to the detriment rather than the benefit of the public."

It is said in argument that, generally, *mandamus* issues to "compel a public official to perform a ministerial act or duty prescribed by law," to "compel the doing of a specific thing," while here the purpose is to require the adoption of a "course of official action," albeit a "course required by statute and imposed upon the official by law," that would call for the court's general supervision of "official conduct" and in "numerous instances" a determination whether the particular officer has, "to the extent of his power, carried out the mandate of the court,"—in a word, a continuous superintendence of duty performance for an "indefinite time," involving a "general course of official conduct for a long series of continuous acts to be performed under varying conditions" and "recurrent yearly controversies as to whether the order has been complied with," a course alien to the nature of *mandamus*, citing 34 *Am. Jur., Mandamus, section* 74; *Hawkes* v. *Gates*, 129 *N.J.L.* 5 (*Sup. Ct.* 1942); and that there is the even more compelling "substantive reason", as distinguished from the "procedural" and the "discretionary," that the process is designed to remedy rather than promote a wrong, "to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or a private mischief, or which will be within the strict letter of the law, but in disregard of its spirit," and may not be had "under the guise of enforcing a public right," if in fact it will operate to the detriment rather than to the benefit of the general public, or cause great disorder and confusion in the fiscal affairs and duties of the officers of a public or *quasi*-public corporation," or if "public injury or embarrassment might" otherwise "result from the issuance of the writ," again citing 34 *Am. Jur., Mandamus, section* 35.

The reasoning denies the thesis that the "century old practices of assessors of assessing property at less than the true value throughout the State can thus now," by this proceeding, "be readily remedied because tax assessors now have the tools at hand, through the data collected by the Director of the Division of Taxation, to achieve this objective," of which more hereafter; and it is said that "In considering the ramifications and complexities of the assessment problem," it is to be borne in mind that "widespread inequities are not confined to disparities in assessment ratios between the various taxing districts of each county, and between the individual property owners," and "Much greater dislocations in the economy of the State may result from the process of equalizing disparities as between assessment ratios applied to different *classes* of properties by various municipalities," *e.g.* "* * * it seems generally conceded that many urban municipalities traditionally assess industrial property at substantially higher percentages of value than residential property," sometimes explained, it is said, as a device employed by "urban municipalities * * * to delay, if not prevent, the gradual exodus of their residential population to the rural and suburban areas,'' in which category ''probably falls the practice of assessing railroad property at 100% while using a different and lower percentage for other property,'' although, on the other hand, it has been said that ''rural and suburban communities often seek to attract industrial enterprises from the cities through tax concessions.''

Conceding such practices are indefensible, and ''it would, be folly to deny they have existed and have been tolerated,'' it is nevertheless insisted that it ''would be dangerous to assume'' that these usages ''which have been embodied in the tax policies can be removed without a violent shock to our economy,'' and the question raised is stated to be whether the ''major surgery required to eliminate such wholesale inequities can be accomplished through judicial fiat, and whether, if it can be accomplished, this Court should undertake the task.''

In none of the 567 municipalities of the State is real property assessed at full value. This is not a recent development; it has always been thus. And the Director of the Division of Taxation has found as the result of a sales-price study, that the assessment ratio for 1956 ranges from a high of 70.8% to a low or 7.8%.

The generally accepted limitations upon the exercise of the ancient extraordinary remedy of *mandamus* obtain in New Jersey. It is a coercive process that commands the performance of a specific ministerial act or duty, or compels the exercise of a discretionary function, but does not seek to interfere with or control the mode and manner of its exercise or to influence or direct a particular result. *Mandamus* lies to compel but not control the exercise of discretion. *Roberts* v. *Holsworth*, 10 *N. J. L.* 57 (*Sup. Ct.* 1828); *Benedict* v. *Howell,* 39 *N. J. L.* 221 (*Sup. Ct.* 1877).

## *Appendix H*

Unless the particular duty be peremptory, the fair exercise of judgment and discretion is the province of the functioning authority. The right of the relator and the public duty sought to be enforced must be both clear and certain. *Uszkay v. Dill*, 92 N. J. L. 327 (*Sup. Ct.* 1919); *Edward C. Jones Co.* v. *Guttenberg*, 66 *N. J. L.* 58 (*Sup. Ct.* 1901), affirmed *Id.* 659 (*E. & A.* 1901); *Clark* v. *City of Elizabeth*, 61 *N. J. L.* 565 (*E. & A.* 1898). *Mandamus* issues "to compel the performance, in a specified manner, of ministerial duties so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of their performance, but as to all acts or duties depending upon a jurisdiction to decide questions of law or to ascertain matters of fact, on the part of the officer or body at whose hands their performance is required, *mandamus* will not lie." *Mooney* v. *Edwards*, 51 *N. J. L.* 479 (*Sup. Ct.* 1889).

*Mandamus* is a legal remedy for the protection of purely civil rights. Time has worked changes in the early common-law concept of *mandamus* as a prerogative writ. The modern tendency is not to treat it as a prerogative writ save when invoked in matters of direct concern to the public, but as an ordinary writ of right to remedy official inaction. In New Jersey, prior to the adoption of the 1947 Constitution, the issuance of the writ ordinarily involved the exercise of a sound discretion; but in the enforcement of private rights the lawful exercise of discretion excluded mere caprice or arbitrary action and required that the rights of the parties in the particular case be declared and enforced according to law.

Yet, for the furtherance of essential justice, the allowance of the remedy of *mandamus* is governed by well-defined considerations of policy. The process issues to redress and not to promote a wrong; to command the performance of a duty which ought to be performed, not to coerce an act which will work a public or private mischief, or will be within the strict letter of the law, but in disregard of its spirit. It may be refused where the result will be "disorder and confusion, * * * or where the rights of third persons will be injuriously affected;" and, controlled as it is by equitable principles, and by due regard to the public interest, *mandamus* will ordinarily be refused where compliance with the writ would "work a public injury or embarrassment, just as in its sound discretion a court of equity may withhold relief where it would be prejudicial to a paramount public interest." *Beronio* v. *Pension Commission of Hoboken,* 130 *N. J. L.* 620 (*E. & A.* 1943). See *McCormick* v. *New Brunswick,* 89 N. J. L. 117 (Sup. Ct. 1916). Although the remedy of *mandamus* is at law, "it may be refused for reasons comparable to those which would lead a court of equity, in the exercise of a sound discretion, to withhold its protection of an undoubted legal right;" and the court, "in its discretion, may refuse *mandamus* * * * to give a remedy which would work a public injury or embarrassment, * * * just as in its sound discretion, a court of equity may refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest." *United States, ex rel. Greathouse* v. *Dern,* 289 U. S. 352, 53 S. Ct. 614, 77 L. ed. 1250 (1933).

The essential nature of the extraordinary remedy of *mandamus* has not been altered by the 1947 Constitution. By *Article* VI, *section* V, *paragraph* 4, prerogative writs "are superseded" and, "in lieu thereof, review, hearing and relief" shall be afforded in the Superior Court, on terms and in the manner provide by rules of the Supreme Court, "as of right, except in criminal causes where *such review* shall be discretionary." (Italics supplied). The writs themselves are superseded; but the substantive jurisdiction remains the same.

In historic perspective, the significance of the constitutional provision is clear. At the common law, until the statute of 9 *Anne, c.* 20, the award or refusal of a peremptory writ of *mandamus* on the return to an alternative writ was not reviewable on error, for reasons which need not be set down here. See *Kenny* v. *Hudspeth,* 59 *N.J.L.* 504, 527 (*E. & A.* 1896); also *Reg.* v. *Lambourne Valley R. Co., L.R.* 22 *Q. B. Div.* 463, 16 *Eng. Rul. Cas.* 788. By statute and the practice in New Jersey, the award or refusal of a peremptory *mandamus* was deemed discretionary and not subject to review on error unless, by a moulding of pleadings on an alternative writ, return and judgment, as in personal actions, the rights of the parties were determined, and then a writ of error would lie according to the course of the common law. *Kenny* v. *Hudspeth, supra* for the practice, see *Silverthorne* v. *Warren Railroad Co.,* 33 *N.J.L.* 173 (*Sup. Ct.* 1868).

Save where the constitutionality of a statute was involved, *R.S.* 1937, 2:83-15, the award or refusal of a writ of peremptory *mandamus* on the return of a rule to show cause, and not by judgment on pleadings moulded under an alternative writ, was not reviewable on error or by the later appeal. *Trinkle* v. *Donnelly,* 98 *N.J.L.* 298 (*E. & A.* 1922); *Mannino* v. *Moffett,* 108 *N.J.L.* 545 (*E. & A.* 1932); *Layton* v. *State,* 28 *N.J.L.* 575 (*E. & A.* 1860); *City of Camden* v. *Public Service Ry. Co.,* 84 *N.J.L.* 309 (*E. & A.* 1913). The proceedings on *mandamus* were then "largely within the discretion and control of the court," and the court could "decline to hear the application for a writ unless in the alternative form, and the power of the court on the hearing of a rule to show cause and, after the decision, to direct an issue by proper pleadings to provide for a review by writ of error [was] unquestionable." *Clark* v. *Elizabeth, supra.* And the granting of leave to proceed to judgment by the alternative form also involved the exercise of judicial discretion. *Roberts* v. *Hetrick,* 125 N. J. L. 633 (E. & A. 1941); *Piaget-Del Corporation* v. *Kulik,* 134 N. J. L. 147 (Sup. Ct. 1946); *Kenny* v. *Hudspeth, supra.*

Such was the character and quality of *mandamus* under the 1844 Constitution and before, although, as indicated in *Beronio* v. *Pension Commission of Hoboken, supra,* there was even then a tendency so to regard the proceeding only when the subject matter was of direct concern to the public, and otherwise as an ordinary writ of right.

So also, the allowance and refusal of the prerogative writ of *certiorari,* and the vacating of an *allocatur,* involved the exercise of judicial discretion not reviewable on error. *State* v. *Wood,* 21 N. J. L. 682 (Sup. Ct. 1847); *State* v. *French,* 24 N. J. L. 736 (E. & A. 1853); *Daniel B. Frazier Co.* v. *Long Beach Township,* 110 N. J. L. 221 (E. & A. 1933); *Post* v. *Anderson,* 111 N. J. L. 303 (E. & A. 1933); *Strobel Steel Construction Co.* v. *Sterner,* 128 N. J. L. 379 (E. & A. 1942), cert. den. 317 U. S. 656, 62 S. Ct. 53, 87 L. ed. 527 (1942); *Burlington County* v. *Martin,* 129 N. J. L. 92 (E. & A. 1942); *Staubach* v. *Cities Service Oil Co.,* 130 N. J. L. 157 (E. & A. 1943); *Gallena* v. *Scott,* 1 N. J. 430 (1949). No matter how meritorious the cause, the denial of the writ was final. It was the inadequacy of the State remedy that moved the Federal court to take jurisdiction in *Hillsborough Township* v. *Cromwell,* 326 U. S. 620, 66 S. Ct. 445, 90 L. ed. 358 (1946).

And granting or refusing leave to file an information in the nature of a *quo warranto* also concerned the exercise of discretion not subject to review, although by statute it became a writ of right in certain cases. *State, ex rel. Mitchell* v. *Tolan,* 33 N. J. L. 195 (Sup. Ct. 1868); *Clark*

v. *Searing,* 70 N. J. L. 517 (Sup. Ct. 1904); *Conover* v. *Old,* 80 N. J. L. 535 (Sup. Ct. 1910); *Robibero* v. *Hillery,* 137 N. J. L. 96 (Sup. Ct. 1948); *Pellecchia* v. *Mattia,* 118 N. J. L. 512 (Sup. Ct. 1937). See R.S. 1937, 2:84-1; N.J.S. 2A:66-6.

In short, the constitutional regulation concerns the right to invoke this extraordinary jurisdiction, but not the substantive principles governing the right to relief, such as, *e.g.,* the time-honored dictates of equity and the limitations imposed in the essential public interest. See *Evans* v. *Villani,* 19 N. J. Super. 86 (App. Div. 1952).

## II

We come now to the ultimate question of the propriety of directing the local assessor to assess the taxable real property of the municipality at "full and fair value" and at the price at which, in his judgment, such property "would sell for" at a "fair and *bona fide* sale by private contract on October 1st of the preceding year."

"All property real and personal" within the jurisdiction of the State, save as otherwise expressly provided, is subject to taxation annually "at its true value, and shall be valued by the assessors of the respective taxing districts." R.S. 54:4-1, as amended. The taxable personal property shall include "only tangible goods and chattels," except as otherwise provided by R.S. 54:4-20; 54:4-21 and 54:4-22. Omitted property is assessable by the county board of taxation. R.S. 54:4-47.

The local assessor is ordered to identify the owners of all real property situate in the taxing district, and to determine "after examination and inquiry" the full and fair value of each parcel of real property * * * at such price as, in his judgment, it would sell for at a fair and *bona fide* sale by private contract" on the prior October first. R.S. 54:4-23, as amended.

## *Appendix H*

The "tax on all tangible personal property," except as otherwise provided, "shall be assessed in and for the taxing district where the property is found." R.S. 54:4-9, as amended. The assessor "shall annually ascertain by diligent inquiry and by the oath of the persons to be assessed and others" the names of all the persons taxable in his district and the "true value of all the personal property therein." R.S. 54:4-12.

This standard of "true value" did not have its genesis in legislative discretion; it was a mandatory rule of action by force of the amendment to the 1844 Constitution adopted in 1875, *Article* IV, *section* VIII, *paragraph* 12, directing that "property" be assessed for taxes under general laws, and by uniform rules, according to its true value." But now, by the 1947 Constitution, *Article* VIII, *section* I, *paragraph* 1, it is ordained that property shall be "assessed for taxation under general laws and by uniform rules," and "All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value," and "taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district."

But there has been no alteration in the peremptory statutory assessment criterion of true value. Yet the basic concept is the same. The dominant principle of the new constitutional mandate is equality of treatment and burden; and this was the genius and spirit of the old provision as well. The standard of true value is but a means of realizing uniformity and equality, the preeminent consideration in the apportionment of the tax burden in virtue of the constitutional guaranties of due process and the equal protection of the laws. Were the rule of the State Constitution of a radically different import, the equal protection clause of the Fourteenth Amendment would prevail, for the right of equal treatment thereby secured protects the individual from State action making for discriminatory imposts not laid on others of the same class. *Baldwin Construction Co.* v. *Essex County Board of Taxation,* 16 N. J. 329 (1954). As there observed, one of the statutory provisions implementing the true value standard of the old Constitution, R.S. 54:3-13, enjoined the county board to "secure the taxation of all property in the county at its true value, in order that all [taxable] property * * * shall bear its full, equal and just shares of taxes."

The framers of the 1947 Constitution had this basic principle in view. It is mathematical truth that in this regard there can be no essential difference between true value and a common ratio of true value applicable alike to all in the same class. In either event, the base is true value, and the assessments are in fact made according to the same standard of value. The question is whether there are variations of ratio making for substantial inequality in the distribution of the burdens of government violative of basic right. "Common" ratio imports equality in the incidence of the tax, the equality of burden that is of the essence of the constitutional precept. As said in *Baldwin,* the common assessment ratio was from the beginning given recognition under the old constitutional and statutory standard of "true value." The direction for the assessment of property "under general laws, and by uniform rules, according to its true value," the standard laid down in the 1875 amendment to the 1844 Constitution, "requires, and is fulfilled by such regulations as should impose the same percentage of its actual value upon all the taxable property in the township for township purposes, in the county for county purposes, and in the state for state purposes." *Stratton* v. *Collins,* 43 N. J. L. 562 (Sup. Ct. 1881), Dixon, *J.* See *State Board of Assessors* v. *Central R. Co.,* 48 N. J. L. 146, 307 (E. & A. 1886), Dixon, *J.*

But this is not true of the "average" assessment ratio of true value, an arithmetical means of varying ratios of true value, necessarily making for unequal proportions of value between the individual property owners and thus for the inequality of treatment and burden obnoxious to basic principle.

The general disregard of the full true value standard has given rise to problems that cannot be solved overnight. Sudden and drastic changes in the long-established practice could work great detriment to community fiscal life; the everlasting temptation to spend may be given free reign; and care must be taken that the *mandamus* process shall not be made the instrument of confusion and the unsettling of the local economy and even greater intra- and inter-county inequality.

The problem is now one of deep public concern. There is evident apprehension of harsh economic dislocation that may be averted by an orderly and systematic approach to the basic administrative deficiencies in the assessment process, such as are not remediable at one fell swoop but rather by specialized and considered judgment after full inquiry, bearing in mind the new constitutional principle of assessments according to the same standard of value.

The Legislature has taken cognizance of the essential fault and the public need, and is seeking for the remedy. December 20, 1956, a concurrent resolution jointly introduced by seven Senators, Messrs. Jones, Dumont, Crane, Shershin, Forbes, Murray and Fox, was adopted by the Legislature requesting the Commission on State Tax Policy to "undertake a special study of the impact of enforced assessment of real property at 100% of its true value upon tax rates, the taxation of personal property, municipal and school debt limits, State aid formulas, special taxes based upon real property assessments, existing exemptions and general tax revenue requirements of counties and municipalities," and to "report specially to the Governor and the Legislature its findings and recommendations for temporary, transitional and permanent changes, if any, in the entire State tax structure which the results of its study dictate to be desirable or necessary for equitable distribution of the total imposition of State and local taxes," not later than the first week of December 1957, and such interim reports "as its study shall dictate."

These are the recitals embodied in the resolution: "Recent developments relating to the taxation of real property in respect to the assessment thereof according to its value have again called attention to the imperative necessity for a re-examination of the state of the law upon this subject;" "Large numbers of the citizens and taxpayers of the State are deeply concerned over the potential requirement that assessments of real property be substantially raised in many taxing districts;" "Concern exists as to whether assessment of all real property throughout the State at full true value may create a redistribution of the tax burden not readily foreseen;" and "Many citizens and taxpayers have petitioned the Legislature to give consideration to the need for a revision of the statutory law in respect to the assessment of real property according to the standard of true value."

We respect these findings of the lawmaking branch of the government; the problem is basically legislative and administrative.

And, moreover, a hurried general assessment at full true value would not be conducive to common and individual right. A sales-assessment ratio study cannot for obvious reasons be determinative of true value in the statutory sense. Furthermore, the market value is evidential but not the exclusive criterion; it is not the invariable test of true

value. Special circumstances may "increase or depress market value without affecting true value or *vice versa.*" *Harborside Warehouse Co., Inc.* v. *Jersey City,* 128 N. J. L. 263 (Sup. Ct. 1942), aff'd 129 N. J. L. 62 (E. & A. 1942); *Universal Insurance Co.* v. *State Board of Tax Appeals,* 118 N. J. L. 538 (Sup. Ct. 1937); *Newark* v. *Tunis,* 82 N. J. L. 461 (E. & A. 1911); *North Bergen Township* v. *Bergen Boulevard Holding Co.,* 133 N. J. L. 569 (E. & A. 1946); *L. Bamberger Co.* v. *Division of Tax Appeals,* 1 N. J. 151 (1948). "Value for the purposes of taxation has some measure of permanency which renders it secure against general temporary inflation or deflation." *City of Newark* v. *West Milford Township,* 9 N. J. 295 (1952).

The sales-assessment ration data do not provide the basis for an intra-municipal true value assessment of individual parcels of real property. Division Director Neeld, a perspicacious public servant in this intricate field of government, in an article published in *New Jersey Municipalities,* January 1956, "*The Gibraltar Case—Full True Value Assessments,*" affirmed that "Sales-assessment ratio data are usable for two basic purposes: a—To test the quality of the assessment roll of a district, and b—To approximate the aggregate true value of real property within a district for various apportionment purposes," and "are not intended nor considered to be useful for the purpose of making full value assessments against specific parcels of real property." He demonstrated that "* * * sales ratio data are [an] inappropriate source material for the development of assessment rolls on a full-true-value basis," for, he said, "in the taxing districts different classes of real property, such as vacant land, residential property, farm land and commercial and industrial property are assessed at different percentages of true value," and, moreover, if a district's ratio is 20%, a multiplier of 5 applied to the aggregate assessed valuation will produce an approximate aggregate full true value for the district, it does not follow that the application of such a multiplier to individual items will move the assessment on each property in the district to full true value,'' since this would be so ''only in the event that each assessment was already at precisely 20% of true value,'' and the 20% in fact ''represents merely the average ratio of assessed to true value of all of the properties on the roll which necessarily means that there are many with ratios far above and many with ratios far below this average,'' and while such data ''will have value in aiding the administrative agencies to determine the existence of inequalities within a district, and may even assist the courts in dealing with cases involving alleged discrimination, nevertheless, such data cannot be employed as a substitute for the expertness, judgment and discretion required in formulating an original assessment for each parcel of property on a full true value basis.'' The sales-assessment ratio data have been used for equalization by the aggregate method for the apportionment of county taxes among the municipalities, and the proportional distribution of State school aid. See *Gibraltar Corrugated Paper Co.* v. *North Bergen Township,* 20 *N. J.* 213 (1955); *City of Passaic* v. *Passaic County Board of Taxation,* 18 *N. J.* 371 (1955); *Borough of Totowa* v. *Passaic County Board of Taxation,* 5 *N. J.* 454 (1950).

Recognizing the complexities of inequality in the sharing of the tax burden, the public exigency, and the inadequacy of local assessing facilities, 99 of the State's municipalities have had professional ''revaluations'' made since 1950 of their taxable real property by outside specialists in the field and ''new assessment rolls prepared,'' 20 taxing districts now have underway such ''revaluation programs,'' as distinguished from ''reassessment'' procedures, and 15 others are about to engage in revaluation projects. This, according to a recent report of the *Local Property Tax Bureau of the State,* which declares also that "it is worthy of note that assessors in several districts have personally carried out extensive reassessments in an effort to eliminate inequalities to the best of their ability and judgment," but "(t)hese are not considered a satisfactory basis for a revision of an assessment roll at a distinctly different ratio than is in effect at present." Newark, for instance, has contracts for this professional service at a cost in excess of $430,000. See *Alboum* v. *City of Newark,* 22 *N. J.* 571 (1956). By *L.* 1956, *c.* 48, *N.J.S.A.* 40:50-9, the municipalities are now empowered to enter into contract for the "preparation and execution of a complete program for revaluation of real property for use of the local assessor, * * *." Revaluation is not a mere arithmetical process.

Certainly, the Court would not direct a *mandamus* to the assessors of the several municipalities who have undertaken a revaluation program; and the defendant municipality should not be treated differently, nor denied the time thus given to others for the same purpose. Yet we shall not vacate the judgment. The inquiry as to true value shall proceed, but the mandate otherwise shall not apply to the tax years 1957 and 1958, thereby to afford the Legislature the opportunity to take such measures and provide for such administrative procedures as its own inquiry may prove to be essential to the public interest, and to allow the Township time needed for the fulfillment of the project. It is shown that the municipality comprises 38 square miles and has 12,306 individually assessed properties, of which 800 represent new subdivisions, new buildings, and so on, and the directed "reassessment" would be an "obvious physical impossibility" within the time allotted.

Neither local debt limitations nor the impact upon revenue of assessments at true value in relation to the public utility gross receipts tax is of major concern in this inquiry, for the Legislature has full power to provide for an immediate adjustment of the particular statutes to the altered local economy. It is the magnitude of the task of revaluation and the danger of windfall inflationary spending that counsels so strongly against drastic and abrupt action—the likelihood of even greater discrimination by hasty and ill-considered assessments and the disposition to spend when "new" revenues are at hand, measured by the old tax rate, restrainable only by a statutory tax ceiling or "freeze" in accordance with the old rate mathematically readjusted, a measure that could prejudice local fiscal action and work serious injury to the individual taxpayers and hardship in other directions, but one that at all events calls for the studied consideration of the legislative authority when all the facts and circumstances are known.

The readjustment will take time, but it should not be unduly prolonged; and so the inquiry as to true value should proceed meanwhile, for, whatever the ratio, the base of real property assessments for taxation is generally its value, and prompt action to this end will not be wasted effort or useless expense.

And the local authorities are admonished that the current assessment statutes, *ante,* place real and personal property in the one category, to be assessed at "true value." The assessment of real property at full value and tangible personal property at less would violate the statutory rule of equality. And we allude again to the element of inequality attending the fulfillment of the judicial mandate in but one municipality of the county, and the obvious need of joint action under the one standard by all such municipalities when the time arrives, requiring that they be made parties to the action, if need be to secure the requisite uniformity.

The plaintiff will have her remedy in the statutory tribunals for transgressions meanwhile of her right to equality of treatment.

And we find no need in these circumstances to direct the County Tax Board to perform its duty under the law.

The judgment is modified accordingly.

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## Concurring Opinion of the Supreme Court of New Jersey

WEINTRAUB, J. (Concurring).

For more than a century our statutes have provided for equal taxation of real and personal property at true value. The Constitution of 1844, as amended in 1875, provided that "Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value." Art. IV, §7, par. 12. Our present Constitution provides in Article VIII, Section 1, paragraph 1:

> "Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value; and such real property shall be taxed at a general tax rate of the taxing district in which the property is situated, for the use of such taxing district."

Although this provision permits different legislative treatment of personal property from that accorded to real property and the use of percentage of true value as to real property, our statute still commands that real and personal property be treated alike and be assessed at true value, *R.S.* 54:4-1.

There has been a century of wholesale disregard of these mandates. *City of Passaic* v. *Passaic County Board of*

*Taxation,* 18 N. J. 371, 378 (1955). Municipalities vied for a lower percentage of true value to gain advantage in the allocation of the cost of county or regional government and in the distribution of state aid for schools, under both of which programs the edge was in favor of the taxing district with a lower ratio. In addition to this intermunicipal maneuvering, discrimination as among taxpayers within the taxing district has been characteristic. Broadly speaking, different percentages of true value have been evolved as to farm land, vacant land, dwellings, and commercial and industrial properties, reflecting local appraisals of ability to pay or other local interests. In the certain areas, largely urban, commercial and industrial properties have absorbed a higher tax burden than other classes of real property. In some areas the reverse is true, tax advantage having been used to attract enterprises which but for this preferential treatment would have located elsewhere to obtain the benefit of other economic factors.

The treatment of personal property has been too variant to admit of categorical statement beyond the notorious fact that because of like considerations and the inherent difficulty of ascertaining its *quantum* and value, even the kind of uniformity found in the case of real property is absent in the assessment of personal property, both within that class and in relation to the treatment of real property.

These are hard facts and local economies have been geared to them. And property having been bought and sold for generations upon the basis of reality rather than constitutional and legislative prescription, it is manifest that if all property were assessed in harmony with law there would be a windfall to some and hardship to others.

There has been nothing secretive about these local practices, although the extent of the deviations from law were not revealed in mathematical terms until fairly recent events. These facts were so evident that legislation has been enacted upon the premise of their persistence. Thus the legislature provided for distribution of state aid for schools upon tables prepared by the Director of the Division of Taxation upon his own findings of the average ratio of taxation in the municipalities. Chapters 85 and 86 of the Laws of 1954; *N.J.S.A.* 18:10-29.30, *et seq.; N.J.S.A.* 54:1-35.1, *et seq.* And more recently the statutory form of the local assessor's affidavid was amended so as to delete therefrom the statement that assessments were made on the basis of true value, an amendment which was enacted in response to assessors' demands for relief from possible criminal charges in the light of the mounting attention to the problem. Chapter 244 of the Laws of 1955, amending *R.S.* 54:4-36.

The other branches of government have been neither indifferent nor indolent. They inherited a problem they did not generate. "For over a century, legislatures, governors and public commissions have recognized the breakdown of the general property tax and have tried all the remedies of their day—but none have succeeded." *Sixth Report of the Commission on State Tax Policy,* (1953) p. xvii. None among the humble will suppose his ukase would suffice. There is no easy solution for all the facets, but progress has nonetheless been made. The problem of intermunicipal competition has been fairly and substantially resolved. With respect to the distribution of state aid, the use of the Director's tables pursuant to the statute cited above has achieved essential equality. With respect to the distribution of the costs of county government, the Director's tables have furnished the county boards with a tool for equalization of aggregates, and it is said that 20 of the 21 counties have either accomplished such equalization or are about there. Progress has been made with respect to the distribution of the costs of regional schools. See *Township of Berkeley Heights in the County of Union* v. *Board of Education of the Union County Regional High School District No. 1,* 23 N. J. 276 (1957); *Maplewood Township* v. *Essex County Board of Taxation,* 39 N. J. Super. 202 (App. Div. 1956).

It is the far knottier problem of equalization as among individual taxpayers as to which a solution has yet to be evolved. And it is that problem which the present case brings before us.

## I

Plaintiff alleged that her land and dwelling were assessed for 1955 at $31,000; that the Director's tables reveal the average ratio of assessed to true value in the township to be 15.45%; and that on that basis the true value of her property must have been deemed by the assessor to be $200,647, whereas "The true value of plaintiff's properties in fact is substantially less than the value so computed." How much less she does not say.

Plaintiff did not make out a case of intentional, invidious discrimination against her. *Snowden* v. *Hughes,* 321 U. S. 1, 8, 64 S. Ct. 397, 88 L. ed. 497 (1944). She alleged that the Sixth Report made by the Commission on State Tax Policy showed that in the tax years preceding 1953 residential real property in the township was assessed at 14% of true value and commercial and industrial real property at 18% of its true value. She charged further that on September 28, 1955 the Director of the Division of Taxation found the average ratio of assessed value to true value of real property in the township to be 15.45%. An affidavit on the motion reveals the Director's finding was based on the following data gleaned from 862 sales between July 1, 1954 and June 30, 1955:

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| | *Sample* | *Ratio Range* | *Average Class Ratio* |
|---|---|---|---|
| Vacant land | 124 | 6.04% to 80% | 25.46% |
| Residential | 728 | 3.08 " 80 | 14.40 |
| Farm | 5 | 10.43 " 35.16 | 22.89 |
| Other | 5 | 10.10 " 30.47 | 12.67 |
| | 862 | Weighted average | 15.45% |

The assessor in his affidavit averred "The said assessment which I placed upon plaintiff's property was made according to my best judgment as to the value of plaintiff's property in relation to the property in the area and according to the same standard of value used for other properties in the Township."

It was conceded before us that the assessor did not attempt to use full true value, but there is no proof or concession that he singled out plaintiff for disproportionate treatment. Insofar as we might be willing to conclude from the evidence that the assessor differentiated consciously between different classes of property, it would have to be said that residential property faired quite well, the average class ratio being considerably below that found as to vacant land and farm land and slightly above the category denominated as "other". The table of equalized valuations for 1955 shows that on the basis of true value the total valuation of "other" properties was $6,850,829 out of a grand total of $81,010,001.

With respect to "discrimination", the record as it stands would support at most a finding that plaintiff, to an extent not revealed, faired more poorly than some other property owners and perhaps did better than others, and not because of any invidious design as to her, but essentially because the assessment rolls got out of hand. This situation is not peculiar to Middletown township, but rather is typical, as the Director's tables show, of the situation in other municipalities. The reason is free of intentional wrong Assessors have not kept and at the moment we may well assume they could not keep their rolls current with economic movements. The assessor, whose office perhaps is legislatively geared to an era which has passed and who in many cases is but a part time official, finds to be monumental the duty to keep all property at any uniform valuation. There is no connection between that problem and the statutory mandate to use true value. The same discrepancies would exist whether the assessor sought to abide by full true value or any percentage of it, although the use of full true value would tend to magnify and thus to reveal more sharply the inequities which have unwittingly developed.

All agree that the Director's tables do not furnish ready aid to bring all properties up to either true value or any uniform percentage of true value. For example, the Director's finding of an average class ratio of 14.40% as to residential property is based upon sales which reflect valuations ranging from 3.08% to 80%. Hence if one should multiply the individual residential assessments as they now stand by the factor obtained by dividing 14.40 into 100, the result would not be equalization but rather the aggravation of existing discrepancies. Nothing short of complete revaluation of all parcels and some technique to keep them current will resolve the kind of "discrimination" which plaintiff's case reveals.

In this connection the application for a *mandamus* boils down to a prayer that the court order the assessor to do a more efficient job, wholly apart from any showing of a purpose on his part to do a poor one. And the inequity which plaintiff claims she experiences will be resolved, not by a command to think in terms of full value or any set percentage of it, but rather by a command to be more efficient, and indeed to make a complete revaluation, parcel by parcel.

A mere claim of inefficiency is hardly one which invites a judgment of *mandamus.* For relief from injustice flowing from inefficiency, plaintiff should be remitted to another remedy. The point of this extended discussion of the nature of plaintiff's true grievance is to clear this case of any notion that we are dealing here, on a complaint in lieu of the prerogative writ, with discrimination in fact resulting from willful disobedience of duty. Rather, the only complaint which is properly before us is that the assessor intentionally disobeyed a statutory command to think in terms of full true value. I believe plaintiff may urge that complaint as a taxpayer and citizen even if she in fact is the beneficiary of the assessor's violation. 35 *Am. Jur., Mandamus,* §320, p. 73. But a clear comprehension that plaintiff is seeking to vindicate that public right helps to indicate the course we should take.

## VI

It is urged the problem calls solely for an administrative solution, and hence we should decline to entertain the matter. I cannot concur in that view. It is appropriate and indeed the duty of the judiciary to lend its hand in the vindication of a public right. But although the right of plaintiff to be heard is constitutionally assured, Art. VI, §5, par. 4, let the right to relief depends upon the application of principles which control the granting of a *mandamus.* As is fully developed in the opinion of Mr. Justice Heher, *mandamus* will not issue where public harm or confusion may result.

The problem of equalization among taxpayers is far more complex than the problem of equalization of aggregates as among taxing districts. Let us view the setting in which we are asked to order peremptorily the assessment of all classes of real property at true value.

New Jersey is predominantly a property tax state. About 70 percent of all revenues, state and local, are derived from *ad valorem* taxation, and an even greater percent of all local revenues emanate from that source.

As stated above, discrimination among classes of property has been widespread, and properties have been bought and sold for generations on the basis of tax treatment in fact. What will be the impact of sudden uniform treatment of all classes of property? We cannot answer this question even as to Middletown Township on the basis of what little is disclosed in the record before us. It may be that the consequences of uniform treatment within the township itself may be taken in stride. But we must look beyond the township, because, as set forth below, the entire county is concerned and moreover since the precedent we establish here will apply as well throughout the state, and we may assume that interests concerned await our opinion and will be energized into action by what we say here, we cannot omit to think in terms of statewide implications.

"New Jersey taxes on residences are almost double the national average." *Sixth Report of the Commission on State Tax Policy* (1953), p. xxiv. We know, for example, and hence cannot ignore it, that thousands of new homes have been purchased on a basis which to the buyer is the practical equivalent of a rental proposition in which the annual tax bill is a potent factor. What will happen to these purchasers and the owners of homes generally if the extra burden now borne by commercial and industrial real property is shifted to residential? In those areas in which industries were lured by gentlemanly understandings of tax preference, will they leave or stay, and if they leave, what will be the impact upon local economies built upon them?

Some utilities are taxed upon the application of the average rate of taxation upon their gross receipts in lieu of *ad valorem* taxation of certain properties. The average rate of taxation passed the $7.50 per hundred mark and by recent legislation a ceiling was placed at that figure and a floor at $5.00. Chapter 268 of the Laws of 1955 and Chapter 15 of the Laws of 1956; *N.J.S.A.* 54:31-50. The total yield to local governments from this source in 1956 was $28,325,764. It has been estimated that if all property were assessed at full true value, the average rate of taxation would fall far below $5.00. What would happen to the municipalities concerned if they suddenly lost one-third of that revenue?

The statute commands that personal property be assessed at full true value, and as pointed out below, we are not free to ignore that command if we should decide to act. What will happen to commercial and industrial enterprises which doubtless in many instances have a local understanding and even without it pay on a basis far below true value? What of the resident, if his household effects should be assessed at full true value and thus be required to share equally the excess burden now placed elsewhere?

Class II railroad property is assessed at the state level for local use and in 1956 the yield was $14,363,933. The railroads claim the state assessor uses full true value while the municipalities which receive the proceeds tax the several classes of real property at varying rates, all below 100 percent. If this be a fact, what would happen to the residents of those municipalities if a portion of the differential were shifted to them by increasing their assessments to full true value?

*Appendix H*

There are other cognate problems. In theory, if all property were assessed at full true value, the individual tax bill in terms of dollars should remain the same. But men seasoned in public life assert that fact will not match theory, saying the reduction of the tax rate will encourage demands for greater expenditure which are now resisted by a forbidding tax rate. The borrowing capacity of local government is hinged to its total ratables. To lift them to full true value would, it is claimed, lead to pressures to borrow more. And if legislatively some standard other than full true value is prescribed for that purpose, what would be the impact upon the bonds or borrowing capacity of those municipalities whose total ratables are based on a percentage above the one selected? What technique will solve that dilemma?

I have posed a number of questions and answered none. The long and short of it is that we know enough to be wary, but not enough to know the answers. And the reason is evident. The record before us and indeed the judicial process itself are inadequate to ascertain the facts with respect to problems of such breadth. If we could resolve them by the stroke of a pen, I would gladly join. But for all I know we might be bulling through a china shop.

It is the obligation of the judiciary to refrain from peremptory action which may raise havoc with the public welfare. None of us is happy about the spectacle of a constitution or a statute ignored. But there is no appropriate whipping boy, neither the 5 million citizens of our State nor the assessors who fell heir to this extraordinary problem. Although ultimately we must act, yet it is equally our duty to give our citizens a decent opportunity to seek an orderly solution of the manifold problems through their elected representatives or by constitutional amendment if they should conclude one to be necessary and desirable.

A proper handling of the problems will require initially an extensive fact-finding inquiry with respect to the matters suggested above and perhaps others of which I am ignorant, and thereupon the difficult task of conceiving solutions equitable to all in the light of conflicting interests. If a constitutional amendment should be thought to be necessary, there must be an opportunity to propose and vote upon it and then to legislate in the light of the decision at the polls. A complete revaluation of all property in the state will require outside expert assistance, and the opinion has been expressed that if all qualified appraisers in the country could be recruited, a number of years would be needed for completion of the work. It seems to me that in the light of all these considerations, a minimum period of three years is needed, and hence that any order to assess at full value should not be operative for at least that period. I am not unmindful that in the interim some taxpayers will be paying more than they should pay according to the constitutional or statutory mandate. I will not stress the other side, that many of them bought at figures deflated by tax treatment in fact and that obedience to the statute means a matching inequity to others who also bought on the same basis. The larger consideration which to me is controlling is the welfare of the entire public which might be seriously invaded by peremptory action at this time.

## III

Two other matters remain for consideration: (a) the cross-claim against the county board and (b) whether an order should include a direction to assess personal property at true value.

## *Appendix H*

### A

The initial question is whether the taxpayers of Middletown Township have an interest in the assessment practices in the other 50 municipalities of the county.

The individual tax bill reflects (1) the cost of municipal government and (2) the cost of county government (for present purposes I will omit any reference to school districts). Overall, the cost of county government represents about 20 percent of the total tax bills, being more or less than that percentage with respect to a given municipality depending upon the amount of municipal services and the cost thereof.

It seems clear to me that all of the taxpayers of a county are entitled to equal treatment with respect to the distribution of the cost of county government. Distribution among municipalities on the basis of equalization of aggregates of their respective ratables accomplishes a proper allocation of that cost *as among the municipalities,* and if equalization of the assessments within the Township of Middletown were achieved, each taxpayer of the township would bear his proper share of the cost of county government *as against other taxpayers of the township.* But, so far as the tax for county purposes is concerned, each taxpayer is entitled to equality, not merely as against other taxpayers within his own municipality, but also as against all other taxpayers of the county. It is no answer to say that the taxpayer is paying no more than his just share. He is entitled to enforcement of the legislative scheme that all taxable property be taxed equally for the purposes of county government. Just as plaintiff's right to such enforcement of the public duty within her township should be recognized whether she is bearing more or less than the share of the cost of local government which would be hers if the statute were complied with, so also there must be recognized the right of the owner of any property taxed for county purposes to seek enforcement of the statutory scheme for equality as among all amenable to taxation for county purposes. *Driscoll* v. *Burlington-Bristol Bridge Co.,* 8 N. J. 433, 476 (1952); *Garrou* v. *Teaneck Tryon Co.,* 11 N. J. 294, 302 (1953); *Koch* v. *Borough of Seaside Heights,* 40 N. J. Super. 86, 93 (App. Div. 1956), affirmed 22 N. J. 218 (1956); *Haines* v. *Burlington County Bridge Commission,* 1 N. J. Super. 163, 171 (App. Div. 1949).

If the county tax were separately levied by the county itself, the right of each taxpayer to seek enforcement of the statutory scheme throughout the county would be apparent. If the county tax were thus directly distributed by county assessments ranging, let us say, from 3.08 percent to 80 percent, a taxpayer would not be denied the right to enforce the public duty merely because he happened to be paying the same number of tax dollars he would pay if uniformity had been achieved. If I am correct in this premise, then the right of a taxpayer of Middletown to relief as to the entire county with respect to the tax for county purposes should not be obscured and denied by the circumstance that the county tax is levied *via* municipalities and local assessors rather than directly by the county itself.

The defendants seem to be appropriate parties to assert representatively the rights of the individual taxpayers of Middletown. Hence I believe they are entitled to maintain a cross-claim to obtain relief with respect to the other municipalities upon a showing like the one which suffices for relief against them. I agree, however, that the county board is not the appropriate defendant to the cross-claim. The defendants should be the several assessors, for they are primarily chargeable under the statute, and realistically the county board has neither the time nor funds to accomplish individual reappraisals of all property. There is no suggestion that the county board would not perform its function within its means and practical opportunity if the local assessors performed theirs.

### B

Plaintiff did not seek assessment of personal property at true value. The question is whether the court should grant relief solely as to real property. I think it should not if personal property is assessed below full true value, and no one seriously doubts that generally it is so assessed and in some instances not at all. *Sixth Report of the Commission on State Tax Policy* (1953), p. 9.

The statute calls for like treatment or both real and personal property. It is of no moment that the legislature may constitutionally differentiate between the two. The legislature has not, and the provision for true value as to which enforcement is sought appears only in the statute. In short, if *mandamus* is granted to compel assessment at true value, it will be the statute, not the constitution, which is being enforced.

I do not seek to compel plaintiff to urge a right she may prefer not to assert. On the contrary, my point is that she may not ask the court to find and enforce a right different from the one she really has. Her right as a member of the public is to seek enforcement of the statutory plan and not some variation from it. She seeks a judgment which we know would establish and enforce a different policy, to wit, that real property shall bear a greater burden than personal property, for to assess all real property at full true value while personal property is assessed at a lower standard necessarily imposes a greater burden on real property than the legislature has determined.

*Appendix II*

If plaintiff complained only of the failure to assess residential property at true value and sought a judgment limited to such property, surely no court would grant it in the face of the fact that other classes of real property are assessed on a lower basis, for it would be manifest that the judgment would transfer to residential property some of the burden which belongs with other real property. The situation here presented is fundamentally no different. A difference may be found if we consult our private preference, but the policy is not ours to establish. The problem we now have resulted from precisely such determinations of preferences by local authorities. In *R.S.* 54:4-1 the legislature plainly stated its policy that "All property, real and personal * * * shall be subject to taxation * * * at its true value, and shall be valued by the assessors of the respective taxing districts." The assessor's duty to assess *all* taxable property at true value is single and indivisible, and it is that duty and only that duty which a litigant, speaking for the public, may seek to enforce. If a plaintiff alleged and proved that an assessor discharged that duty with respect to all but a portion of the taxable property and sought *mandamus* to compel performance as to such portion, relief so limited would be proper. But far different is a complaint which, as here, seeks not to have *all* taxable property assessed at true value but rather to have only a portion of such taxable property so assessed, and thus asks the court to join in creating a discrimination which the statute forbids. It is inconceivable to me that a court must aid in such discrimination at the bidding of a litigant. "*Mandamus* is a writ designed to remedy a wrong, not to promote one." 34 *Am. Jur., Mandamus*, §34, p. 830. If the assessment of all taxable property at true value should be unpalatable (and doubtless it is), it would merely evidence the inappropriateness of *mandamus* as a remedy for these tax problems.

## IV

The township did not seek to review so much of the judgment as ordered it to appropriate funds necessary to accomplish a revaluation, but the question which that portion of the judgment involves is too important to pass without at least an expression that our action does not impliedly constitute a determination of it.

The duty to assess is placed upon the assessor. *R.S.* 54:4-12, 23. It is his judgment which is required. I do not doubt his authority to accept such help as may be offered, but quite different is the question whether a court may compel him to seek outside assistance or order a municipality to provide it. The legislature has authorized contracts and emergency borrowing for that purpose, Chapter 48 of the Laws of 1956, *N.J.S.A.* 40:50-9, *et seq.*, but has not ordered the municipalities to act. Since the question has not been raised, briefed or argued, and is not necessarily involved in the appeal, we should express no view upon it.

The defendant assessor and the assessors who may be added as defendants to the cross-claim and as to whom a basis for relief is established may properly be ordered to start and proceed diligently to revalue all property, because information thus gathered would seem necessary under any solution of the problem. But any time limitation for completion must take into account the need for proper revaluation. There is no point in compelling such haste that the end product will be characterized by new inequities.

Mention should be made of the objection that since appraisal involves judgment and discretion, it may not be judicially ordered. The difficulty is enlarged by suggesting that upon contempt proceedings liability might depend upon varying views in an area in which experts are prone to disagree. Although on mandamus the end result of an exercise of discretion may not be controlled, it is equally clear that a public official may be compelled to exercise that discretion. 34 *Am. Jur., Mandamus,* §§67-8, pp. 855-8; see *Reid Development Corporation* v. *Township of Parsippany-Troy Hills,* 10 N. J. 229 (1952); *Gallena* v. *Scott,* 11 N. J. 231 (1953). Where, as here, it is conceded that the assessor made no effort to assess at true value, he may be ordered to perform the statutory duty, that is, to undertake in good faith to assess at what he believes to be the true value of the property, without, of course, attempting to control the result he reaches in a *bona fide* appraisal.

## V

Accordingly I would reverse the judgment except as to the county board and remand the cause to the trial court with these directions:

1. To inquire as to whether personal property is assessed at true value, and if it appears that it is not, to permit plaintiff to amend to seek relief with respect to both real and personal property, and in default of such amendment to dismiss the complaint.

2. To permit defendants to amend the cross-claim and to add the assessors of the other municipalities in the county (and the municipalities if defendants should see fit so to do).

3. Upon a finding that the assessors have not sought to assess at true value, to order them to proceed diligently and in good faith to revalue all taxable property, real and personal, at full true value.

4. To order the assessment of all such property at full true value simultaneously upon completion of the revalua-

tions by all assessors in the county (if they are added as parties defendant on the cross-claim and a basis for relief is found) but in no event should such direction be effective prior to assessment for the year 1960.

5. To retain jurisdiction of the cause for such modification or further order as circumstances may justify.

* * *

None of the divergent views within the Court has mustered a majority. Three members of the Court agree upon a result different from the one I prefer and yet not too distant from it. To the end that there may be majority action, I will concur in the result they reach in the opinion by Mr. Justice Heher.

## Dissenting Opinions of the Supreme Court of New Jersey

WACHENFELD, J. (Dissenting)

The query here is whether or not we will sustain the direction of the Superior Court, by way of writ of *mandamus,* in substance compelling the defendant assessors of the Township of Middletown to value and assess all taxable real property at 100 per cent of true value.

The matter complained of is admittedly "not a recent development; it has always been thus." As a matter of fact, the existing practice is more than a century old.

In its sweep, the majority opinion also includes tangible personal property, which was not made an issue or even mentioned in the pleadings before us. No one has yet been given an opportunity of arguing or presenting the matter to us. There are millions of property owners throughout the State who have had notice of this issue and are totally unconscious of its existence. They will awake tomorrow, however, to find themselves substantially affected, not by anything their elected representatives did but by a judicial decree on an issue not even a part of the litigation presently being considered.

Rendering a vital judicial adjudication without representation or notice is contrary to our customary concept of fundamental justice.

Although the majority says "care must be taken that the *mandamus* process shall not be made the instrument of confusion and the unsettling of the local economy and even greater intra- and inter-county inequality," it then proceeds, in the face of its own cautionary warning, to direct the judgment below to stand and merely postpones its effective operation for a period of time.

The majority concludes "the problem is *basically legislative and administrative*" and then inconsistently proceeds to solve it judicially. (Emphasis supplied)

The remedy by *mandamus* is a process, as outlined by the majority, which "issues to redress and not to promote a wrong" and it will "be refused where the result will be 'disorder and confusion, * * * or where the rights of third persons will be injuriously affected' " and is " 'largely within the discretion and control of the court.' "

What may occur by reason of this decision is adumbrated in the Chief Justice's dissenting opinion, where he strives valiantly to overcome the anticipation of chaotic upheaval and injury to the taxpayer. He notes the "fears" that the drastic change "could work detriment to the economic and community fiscal aspects of life in this State" in "chasing away of the industry and the imposition of the burden borne by it upon the residential property, principally the small home owner" and "the temptation, in anticipation of increased revenues."

He then concludes: "But there can be no windfall to the governing body of the municipality at the expense of its taxpayers." I am hoping this is more than wishful thinking, but a practical and realistic approach reflects unusual jeopardy for the taxpayer. The tax structure and mechanism are extremely complicated, and I do not think this court can even begin to visualize and appreciate the far-reaching effects of its decision. Aside from the ensuing inflation of borrowing power which perhaps only the legislature has the right to control, Director Neeld in "The Gibraltar Case—Full True Value Assessments," January 1956 issue of New Jersey Municipalities, stresses that full true value assessments will have the effect of seriously reducing the Public Utility Gross Receipts Tax and disrupting the tax structure with respect to the prevailing spread between real and personal property. He says:

> "In view of the magnitude and complexities of the problem and the dangers of precipitate action, the Legislature may deem it desirable to review the entire field of local property tax administration through a Legislative Commission."

Even though it is "legislative and administrative," in essence, the court nevertheless brings about the drastic change and there is little the taxpayer can do about it now.

The majority is so fearful of the resultant harm it postpones the enforcement of its decree for three years, hoping to be rescued from its own decision by the legislation in the meantime.

It speaks of "the danger of windfall spending," "the likelihood of even greater discrimination by hasty and ill-considered assessments," "the disposition to spend when 'new' revenues are at hand," and of "a measure that could prejudice local fiscal action and work injury to the individual taxpayers and hardship in other directions."

Despite these fears, all well grounded and reasonably to be expected, and with a final wailing lament, "we allude again to the element of inequality attending the fulfillment of the judicial mandate," they affix the judicial seal which may well bring about all the dire things of which they are so apprehensive.

The dictation of the majority, in my opinion, trespasses upon the heart of our constitutional concept of separation of powers among the coordinated branches of government.

While it is true that the statutes require by their terms assessment of property at true value, the admitted and undisputed fact remains that either the local tax assessors, the county boards of taxation, the Director of the Division of Taxation, nor the Division of Tax Appeals has ever undertaken to enforce the statutory mandate to its full magnitude, although they have the complete equipment and the full power to do so. As it now exists, the practice has continued ever since the true value standard was written into the Constitution of 1844, Art. IV, Sec. VII, par. 12, as amended, effective September 28, 1875.

It is hardly the province of this court to sweep away almost a century of precedent in an area which it admits is "legislative and administrative" and constantly under the surveillance of and wholly subject to the legislative processes. Judicial discretion, if not constitutional mandate, warns us not to transgress upon a matter which is so wholly legislative. Our critics, who insist we have usurped legislative and executive functions heretofore, will find substantial and added comfort from this new judicial effort.

The majority recognizes the legislative, together with the executive, branch is presently studying a contemplated revision of true value standards and the administrative machinery for determining and fixing assessments. Whatever changes result will be made by those who are properly empowered to deal with questions affecting all of the people of the State, and it does not behoove us to decide now a matter which they want further time to study. The people have recourse from their conclusions; none from ours.

I would reverse the judgment below and deny the writ.

With this dissenting opinion goes a fervent prayer that its fears, projections and reflections will prove to be completely wrong and that the taxpayer is not to become a sacrificial lamb by judicial fiat and that there will henceforth be equitable equality of tax burdens which we all hope for.

Tomorrow we shall see.

VANDERBILT, C. J. (Dissenting)

## I

### *Background*

By 1875 the unfairness of taxation in New Jersey had reached the point that a constitutional amendment was passed by two successive Legislatures and adopted by the people "at a special election to be held for that purpose only * * * *by a majority of the electors qualified to vote for members of the legislature voting thereon.*" The amending process under the former Constitution of 1844 was indeed difficult of accomplishment, Const. Art. IX, but the need for relief from inequitable taxation was deemed overwhelming. The amendment was simple and seemingly unambiguous:

> "Property shall be assessed for taxes under general laws, and by uniform rules, according to its *true value.*" (Art. IV. Sec. VII, Par. 12 as amended, effective September 28, 1875; all italics supplied.)

All the statutes passed pursuant thereto as well as under the corresponding provision of the Constitution of 1947 (to which I shall refer in due course) have uniformly adhered at every level of the taxing machinery—municipal, county and state—to the standard of *true value* ordained by the Constitution of 1844. These statutes are still the governing law of New Jersey, N.J.S.A. 54:4-1 at the local level; R.S. 54:3-13 and N.J.S.A. 54:4-47 at the county level; and N.J.S.A. 54:2-39 at the state level. It is difficult to conceive of a standard of assessment for taxation more simple or more fair than the standard of assessment at true value.

Yet from 1875 until the present day the very obvious will of the people has been frustrated, notwithstanding the fact that the great increase of government expenditures in the present era of large governmental operations has entailed vast increases in taxation. This unfortunate breakdown in the enforcement of the 1875 amendment has been due, first, to the narrow judicial construction as to the right of a taxpayer to avail himself of the clear popular mandate for taxation at true value, *Royal Mfg. Co.* v. *Board of Equalization of Taxes*, 76 N. J. L. 402 (Sup. Ct. 1908), affirmed 78 N. J. L. 337 (E. & A. 1909); second, to the complicated and ineffective taxing machinery at the local, county and state levels; third, to the long continued failure of the municipal assessors throughout the State to comply with the Constitution of 1844 and the controlling statutes; and fourth, to the failure of the county taxing authorities to supervise the work of the local assessors except through the mechanical equalization of aggregates within a county which reaches only a small part of the widespread and almost universal inequities in the administration of the tax law. Whatever hope there was of obtaining compliance by the local tax assessors of their statutory obligation to assess at true value was diminished when the Legislature as late as December 19, 1955, *L.* 1955, c. 244, repealed N.J.S.A. 54:4-36 requiring each assessor to annex to his assessment list an affidavit stating among other things:

> "I, * * * do swear (or affirm) that the foregoing list contains the valuations made by me to the best of my ability, of all the property liable to taxation in the taxing district in which I am the assessor, and that I have valued it, without favor or partiality, *at its full and fair value*, at such price as in my judgment it would sell for at a fair and *bona fide* sale by private contract on October first last, * * *."

The local assessors are politically elected or appointed officials, many of them part-time workers, incapable of doing the work of taxing experts. Most of the county boards of taxation are not properly financed to do the work the statutes require of them. Only at the state level has the Director of the Division of Taxation attempted to ascertain true value by the systematic assembling of sales data, primarily for the purpose of apportioning state aid to schools, but incidentally for the benefit of the county boards of taxation in their mechanical equalization of assessments in the various municipalities of each county. To understand the present deplorable state of affairs the decision in the crucial case of *Royal Mfg. Co.*, above referred to, must be understood, because it is to a large extent the cause of our present difficulties. There it was held that a taxpayer whose property is not assessed at more than true value has no standing to complain, because under the 1875 amendment to the former Constitution all property must be assessed at true value, and that even if he was discriminated against in favor of other taxpayers, he could not have his assessment reduced, but rather must seek to raise the assessments that were lower than his. This legalistic decision placed on the individual taxpayer the intolerable burden of proving the true value of each property in the municipality—a burden which he could not possibly hope to meet by reason of the sheet expense of such a suit. This unfortunate decision not only ignored the realities of the taxing process; it ushered in the era of what the public and the press, when its possibilities came to be understood, quite properly called "tax lightning." The Commission on State Tax Policy euphemistically but graphically expressed the existing situation in its *Fifth Report* (1950; p. 4):

> "The administration of the general property tax (real estate and improvements) is a choas. On the business side it is a matter of *a more or less gentle bargaining process* that over the years *has created a host of insecure but 'favorable' conditions.*"

This statement is documented with complete county by county tables in its *Sixth Report* (1953; p. 30). At page 27 the Commission summarized its findings as follows:

> "Real estate in New Jersey is assessed at an average assessment ratio of 34 per cent of its value. On this basis, the State-wide average tax rate of $6.77 per $100 valuation taxable in 1952 represents an average effective tax burden of $2.30 per $100 of full value.
>
> "The estimated average assessment ratios vary as among the 21 New Jersey counties from a low of 16 per cent in Ocean County to a high of 56 per cent in Hudson County. Six of the State's 21 counties show estimated average assessment ratios above the overall State-wide average of 34 per cent and three of them (Hudson, Essex and Passaic) show estimated average assessment ratios above 40 per cent. On the other extreme, four counties (Ocean, Burlington, Sussex and Salem) show estimated average assessment ratios of under 20 per cent.
>
> "The variation as among individual municipalities ranges from estimated average assessment ratios *un-*

> *der 10 per cent in seven municipalities to over 60 per cent in two municipalities.''*

Its conclusion (p. 133) as to the inequities of taxation throughout the State seems inescapable:

> *''Never has so much money been raised from so many people so inequitably as in the current administration of the local tax on real estate.''*

Here we have conclusions of fact documented by years of competent study by an official commission that we cannot afford to ignore in the consideration of such vital issues.

The only relief that has been accorded aggrieved taxpayers in New Jersey has come, not through the 1875 amendment, but by virtue of the equal protection clause of the Federal Constitution in the *Hillsborough Township* v. *Cromwell* case, 326 U. S. 620, 66 S. Ct. 445, 90 L. ed. 358 (1946), in which the inadequacy of the *Royal Mfg. Co.* case was adversely commented upon by the United States Supreme Court. In this case the tax collector of a small New Jersey community with total assessed valutions for all property, both real and personal, of $3,139,020, levied assessments in the amount of $221,940,438 upon the intangible property belonging to an individual resident and to a trust of which she was trustee. This assessment would have resulted in additional tax payments of nearly $7,000,000 per year as compared with the township's annual budget of approximately $97,000, an outrageous instance of ''tax lightning'' which had become prevalent in various parts of the State. In that case the United States Supreme Court, which seemed more aware of the economic and political realities of taxation than our courts at that time, correctly criticized the *Royal Mfg. Co.* decision for failing to accord the taxpayer the protection to which he was entitled under the Federal Constitution:

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class. *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 445-447, 43 S. Ct. 190, 191, 192, 67 L. Ed. 340 * * * ; *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U. S. 239, 247, 52 S. Ct. 133, 136, 76 L. Ed. 265; *Cumberland Coal Co.* v. *Board of Revision* [*of Tax Assessments*], 284 U. S. 23, 28-29, 52 S. Ct. 48, 76 L. Ed. 146. The courts of New Jersey in a long line of decisions have held that a taxpayer who has been singled out for discriminatory taxation may not obtain equalization by reduction of his own assessment. His remedy is restricted to proceedings against other members of his class for the purpose of having their taxes increased. The rule was stated in *Royal Mfg. Co.* v. *Board of Equalization* [*of Taxes*], 76 N. J. L. 402, affirmed in 78 N. J. L. 337, as follows: ' * * * the county boards are required to secure taxation of all property at its true value; so that the fact that the property of A is assessed at its true value and the property of other taxpayers within the same district is assessed below its true value, affords A no ground for demanding a

> reduction of his valuation, though it does entitle him to apply for an increase in the valuation of the others'. 76 N. J. L., pages 404, 405. On the basis of that rule it is plain that the state remedy is not adequate to protect respondent's rights under the federal Constitution." (326 U. S., at pages 623-624, 66 S. Ct. at page 448).

Had our courts applied the same reasoning and the same requirements of proof in the *Royal* case, the 1875 amendment and the implementing statute would have been quickly complied with by the taxing authorities.

The doctrine of the *Royal* case was not put to rest in this State until the decision of this Court in *Baldwin Construction Co.* v. *Essex County Board of Taxation,* 16 N. J. 329 (1954); see *Gibraltar Corrugated Paper Co.* v. *North Bergen Township,* 20 N. J. 213 (1955) at page 219. Meanwhile the evil of unfair taxation multiplied. There is inequity among the municipalities of a county, only partially overcome by the equalization of aggregates; there is inequity in many municipalities among different types of property; and there is the greatest of inequity among individual taxpayers owning the same type of property within a municipality, neither of which evils is reached by the equalization method.

In these days of bulging taxes at all levels, the matter of taxation naturally came before the Constitutional Convention of 1947, which labored with the problem, deleted all reference to taxation at true value, and came forth with a new expression of tax policy:

> "Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed accord-

> ing to the same standard of value; and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district." (Const. 1947, Art. VIII, Sec. I, Par. 1.)

Over nine years have passed since the adoption of the new Constitution, but the new provision has not been availed of by the Legislature. The taxation statutes still call for assessments at true value, N. J. S. A. 54:4-1, R.S. 54:3-13, N. J. S. A. 54:4-47 and N. J. S. A. 54:2-39, *supra.*, but the violations of these statutes are just as universal and rampant as they ever have been. The Legislature has never attempted to utilize the constitutional provision of 1947, above quoted, but on the contrary submitted a proposed constitutional amendment to the people last year (1956) on the subject of taxation which would have added to the present Art. VIII, Sec. I, Par. 1 the following sentence:

> "The Legislature may authorize the governing body of any municipality constituting a taxing district to establish a proportion of the standard of value at which such real property situate therein shall be assessed, and such proportion shall be uniformly applied to all such real property within the taxing district." Assembly Concurrent Resolution No. 36. Filed July 17, 1956.

In a release dated November 2, 1956, the New Jersey Commission on State Tax Policy opposed the adoption of such an amendment saying:

> "ACR 36 is intended to head off the effects of an anticipated decision of the State Supreme Court affirming the appellate division decision in *Switz v. Middletown Township.* That decision requires assessors to

> follow the existing law by valuing property at 100 per cent of true value. If the Legislature considers a lower percentage appropriate it has only to amend the statutes, not the Constitution."

* * *

> "* * * the Commission would emphasize that it would be a mistake, from the viewpoint of the long range development of a sound tax system in New Jersey for the people to approve the amendment of the Constitution proposed by ACR 36. All of the proper objectives of this proposal can be accomplished by legislation. The amendment of the Constitution, on the other hand, would create vested interests in the bad practices of the past. The proposal has little merit beyond an easy and temporary method of avoiding statewide equalization on full value assessments, and can result in nothing more than an extension of the past century of inequities."

This proposed amendment was rejected by the people at the polls, *Minutes of the Board of State Canvassers, Department of State,* December 4, 1956, page 7, some claiming that it meant one thing and would produce one result, and others claiming that it meant quite another and would produce a different result. Clarity is the great prerequisite of any tax law, and in this State in view of our experience under the 1875 amendment that clarity must be such that the courts cannot misunderstand or misconstrue; see 2 Sutherland Statutory Construction (3rd Ed.), page 334, where the author observes:

> "It is not allowable to interpret what has no need of interpretation."

The mounting pressure of taxation has led to a renewal of litigation to achieve assessment at true value, where heretofore procedural reasons have been advanced to deny relief; see *Baldwin Construction Co.* v. *Essex County Board of Taxation, supra,* 16 N. J. 329 (1954), where the court held that it was bound by the nature of the proceeding brought which *sought only to review the* action of the tax board and refused to give effect to the requirement of true value because to do so would result in relief in the nature of *mandamus* bearing on the future performance of statutory functions that had not been sought by the pleaded cause; see also *Gibraltar Corrugated Paper Co.* v. *North Bergen Township,* 20 N. J. 213 (1955), where the court at the behest of the complaining taxpayer reduced the taxes from true value to the level set by the standard used in assessing other properties in the municipality. The difference between that case and the instant case is that here the taxpayer is asking to have the property taxed at true value pursuant to the statute.

## II

### *The Pending Case*

Now for the first time we are confronted with a simple suit by a taxpayer of a municipality directly attacking the assessments in the municipality as being at less than true value and seeking to remedy discriminatory and unfair taxation resulting therefrom by forcing general compliance with the command of the statute to assess at true value. The case has gone through the Law Division of the Superior Court and the Appellate Division of that Court. Meantime the defendant municipality has undertaken a reappraisal according to true value of all of the property within the municipality, and we have been advised that that reappraisal has now been completed.

Thus, the case as between the plaintiff-taxpayer and the defendant-municipality and its tax collector is now ripe for decision. To delay decision in the instant case and to permit the inequities of taxation that have existed in the Township of Middletown to continue because some other municipalities have refused to see the handwriting on the wall, as the majority and concurring opinions do, cannot be justified. Incidentally, we are told in the majority opinion that 99 municipalities have undertaken professional revaluation programs in anticipation of enforcement of assessments at true value and 15 more are contemplating such action, but such proceedings, either undertaken or contemplated, constitute no reason for withholding action in favor of the aggrieved taxpayers of the Township of Middletown while we are awaiting either revaluation programs in the remaining municipalities of this State, or a new taxation program from the Legislature. The decision of this case in favor of the plaintiff does not bind any other municipality in the State, though it would, of course, serve notice as to the necessity of their complying with this statute directing assessment of property at true value.

The majority of the Court fear that a decision in favor of the plaintiff, effective now, would upset the economy of the state. To my mind this is attributing to a judgment in favor of the plaintiff, effective now, after a revalution has been completed in the township, a fanciful result, which in the meantime deprives the plaintiff and other similarly situated taxpayers of their undeniable right to immediate fair treatment. The situation in every other municipality would still require decision on the basis of the facts of its particular case, if it comes before the courts.

The majority and concurring opinions concede that in principle the plaintiff is entitled to relief and they acknowledge that conformity with the statutory plan is much to be preferred over the present state of affairs. Yet, because none of our 567 municipalities (except Princeton

Township alone) assess at true value at the present time and because of their "fears", they have elected to excuse non-compliance with the law by the defendants and thus compound the pernicious effects of disregard of the statute. They are afraid that any sudden and drastic change in the established practice could work detriment to the economic and community fiscal aspects of life in this State; that in the areas where it is said "industries were lured by gentlemanly understandings of tax preference", forced equality of treatment may result in the chasing away of the industry and the imposition of the burden borne by it upon the residential property, principally the small home owner; that there will be the temptation, in anticipation of increased revenues, to yield to the desire to obtain those things which have been thought necessary but heretofore unobtainable because of the lack of the wherewithal to purchase them; that a rapid unconsidered transition from failure to comply with the law to compliance with the law will create new conditions not "conducive to common and individual right"; that to order fulfillment of the statutory mandate in but one municipality is to increase the inequities that already exist; that the resulting increase in the debt limitations caused by sudden increases in the aggregate valuations will "lead to pressures to borrow more" and that the measures adopted to alleviate these conditions may result in even greater problems.

There is nothing in the record or in the facts before us to justify these fears of the majority, once the court realizes (1) that the decision of this case concerns only Middletown Township and its inhabitants and (2) that if any other municipality has some special equity that Middletown Township does not have as to the time when its assessments shall be made at true value, it may assert its peculiar equity when its case comes on for hearing. Any peculiar situations in other municipalities are not at all related to the problems of Middletown Township and cannot be permitted to interfere with the decision in its case. The Township of Middletown has undertaken the reappraisal of all of the property within its borders at true value pursuant to the governing statutes. Without any outside help it has completed all but 25% of the reappraisals and under legal advice is prepared to apply a formula to the balance of the properties to bring those appraisals to an estimated level of true value and thus be in a postion to comply forthwith with any judgment of this court requiring immediate assessment at true value. It is, however, now awaiting the judgment of this court before actually assessing all of the property in the township. Meantime the township has not filed its assessments with the Monmouth County Board of Taxation, although we have been assured that they are in a position to do so forthwith, with the result that the County Board of Taxation has been unable to strike a county tax rate or to readjust the aggregate ratables among the municipalities in the county based on the actual assessments for the Township of Middletown. The failure of this court to decide in the pending case to order immediate compliance with the statutory standard is thus not only interfering with the orderly course of taxation in the Township of Middletown but throughout the county as well. The instant case is obviously ripe for decision.

The majority are concerned with an imaginary possibility that in the year of transition from the old order to the new system of assessments at true value more taxes may be raised than were provided for in the budget of the municipality. But there can be no windfall to the governing body of the municipality at the expense of its taxpayers. The present statutes safeguard the citizens against such a contingency. The Local Budget Law, R. S. 40:2-1, *et seq.*

requires that every municipality adopt a budget for each fiscal year, R. S. 40:2-5, and to state in it the "amount to be raised by taxes", R. S. 40:2-13 and 15. This budget upon adoption constitutes "an authorization of the amount to be raised by taxation for the purposes of . . . the municipality", R. S. 40:2-11. The grant of power by the Legislature "to assess, levy and collect taxes" is granted solely for the purpose of supporting "any budget adopted" pursuant to statute "and for all other *lawful* purposes", R. S. 40:2-19; see also 4:48-7. Once the budget is adopted, R. S. 40:2-8, the amount required for public purposes in a particular year has been determined, and except in extraordinary cases it cannot be altered, R. S. 40:2-8, *supra*, R. S. 40:2-9; 40:2-20. The intent of the law is that the receipts, including taxes, in that year should equal the authorized appropriations of the budget. The scheme provided for by statute is that the amount of money required for the public purposes of the municipality be first proposed and fixed and determined after a public hearing, at which the people affected have an opportunity to voice their opinions, R. S. 40:2-6; that the tax rate then be computed by dividing the amount called for by the budget by the gross or aggregate value of the assessments. Thus, the total amount of ratables of a municipality for the particular year in question, multiplied by the tax rate, should equal the amount authorized for public purposes by the budget, R. S. 54:4-48. If the assessment of properties in a municipality at true value is completed and approved prior to the adoption of the budget, as in the usual course it would be, R. S. 54:4-42, R. S. 40:2-10, the new tax rate will reflect the change caused by assessment at true value, R. S. 54:4-48, *supra*. If, however, an increase in the gross value of the ratables in a municipality is caused by assessments at true value after the tax rate is fixed and determined for a particular year based on less than true value assessments, the amount of taxes that would actually be raised would be grossly disproportionate to the amount required by the adopted budget to be raised by taxation and therefore unauthorized.

Protection against any undue inflation of the borrowing power of a municipality is already given by the provisions of the Local Bond Law, L. 1935, c. 77, where the debt limit provided for is based upon the average of "the three next preceding assessed valuations of taxable real property" of a municipality, R.S. 40:1-15 and 16, R.S. 40:1-80 and 82. This would give the Legislature until the session of 1958 to adjust the statutory debt limits, if any adjustment is necessary. As to the years following the year of transition, the taxpayers have it within their power to voice their opinions to their elected representatives as to how much municipalities should spend. The real interest of the taxpayers is in the number of dollars they will be called upon to pay in taxes rather than in the rate at which they are to be taxed and as to the future, as it does today, public opinion and law will protect the people from unconscionable burdens.

## III

### *Procedure*

The majority opinion goes into an elaborate review of the law of the former remedy of *mandamus* and seeks to justify its position with the theme that *mandamus* will be refused when it would promote a wrong rather than redress one, where "the result will be 'disorder and confusion,'" when it would "work a public injury or embarrassment" and where it would "coerce an act which will work a public or private mischief." But none of the cases or authorities relied upon state any principles that would serve to prevent the immediate granting of the relief sought by the plaintiff here. The duty sought to be enforced—the assessment of all property at true value according to the statutory command—is a peremptory one and meets the test of being "so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode" of performance set forth by the authorities cited by the majority. *Mandamus,* along with the other prerogative writs, was superseded by the 1947 Constitution, Art. VI, Sec. V, Par. 4, and in lieu thereof relief as of right has been afforded in civil cases by action in the Superior Court, R.R. 4:88. This provision of the Constitution not only swept aside the discretionary allowance of these prerogative writs and made them proceedings of right, but it was also designed to abolish the many technical requirements and limitations on the use of these prerogative writs and to substitute in their place a proceeding based on equitable principles adopted to the needs of each particular case. The neat distinctions between the several former prerogative writs have no more meaning today than the distinctions that once existed between trover and trespass among the forms of action of an earlier day, or between bills of interpleader and bills in the nature of a bill of interpleader among the equitable remedies of yesterday. These matters are no mere formalities. They go to the very heart of an adequate remedy. The former prerogative writs, like the former forms of action, were encumbered by many technical limitations as distinguished from equitable proceedings which developed later in the story of law and were governed by principles far more flexible and adaptable to individual cases. It is quite as important to the usefulness of proceedings in lieu of prerogative writs that they proceed on equitable principles and be governed by the flexibility of equitable rules as it is that they issue as of right free from the former restrictions of judicial interventions. As was said in *Ward* v. *Keenan*, 3 N. J. 298, 308-309 (1949):

> "Our problem is, therefore, by rules of court and judicial decisions, to preserve as far as may be the substantive law of the former prerogative writs as a means of safeguarding individual rights against public officials and governmental bodies, while at the same time avoiding the defects of procedure that led to criticism * * *.
>
> "In determining what course to pursue under the new practice in this field we should look to the decisions on the old procedure on prerogative writs, not as controlling authorities but for what light they may throw on the instant problems of presenting sound rules of procedures. Much light may also be gained from examining the practice in analogous cases of equitable procedure, for it is becoming increasingly clear, now that discretion in granting of the writ has been abolished, that the procedural principles applicable in the two fields are in many respects identical."

Such actions, although administered in the Law Division of the Superior Court because their predecessor writs originated there, concededly proceed on equitable principles which are as much within the power of the Law Division to apply as it is for the Chancery Division to apply the principles of common law. To hold otherwise would be to unduly restrict, and without serving any purpose whatsoever, the usefulness of proceedings in lieu of prerogative writ.

Here the power of the Court to impose, if necessary, restrictions on the amount of tax funds that may be raised under this judgment in the period of transition, is clear. The power of equity to prevent accident and mistake is fundamental. It took so long to free proceedings in lieu of prerogative writ from the technicalities of the former writs that any return to this outmoded learning would be deprecated.

## IV

### *Conclusion*

The majority says the "dominant principle of the new constituional mandate is equality of treatment and burden" and that the standard of true value, "the peremptory statutory assessment criterion," is "but a means of realizing uniformity and equality." But the new constitutional mandate has not yet been implemented by the Legislature and we have no way of knowing whether or not it ever will be. The attempt to amend the Constitution of last year certainly does not lead us to any conviction that the Legislature is intending the adoption of any statutes implementing the taxing provision of the 1947 Constitution. We are merely called upon to enforce the statutory standard of assessment at true value. That being so, how can a determination of the matter before us which in itself ignores that "peremptory statutory assessment criterion" of true value and suspends for two—or according to the concurring opinion three—tax years the application of the principle of equality of treatment and burden and delays the assessment of property at true value, be said to be the one demanded by the equities of the case?

Professor James C. Bonbright, of Columbia University, in his work "*The Valuation of Property*", Volume I, pages 497, 498, says:

> "Theoretically the taxpayer's pocket is not in the least affected by uniform undervaluation or overvaluation. Systematic undervaluation diminishes the tax base, and the rate must therefore rise in order to supply the

> required government revenue * * *. The objections to the practice of undervaluation are patent. In the first place, except where sanctioned by statute, it involves a generally known and sanctioned disregard by officials of the law requiring them to assess property at its full and fair value. The other great vice is that the percentage of undervaluation is rarely a matter of common knowledge, so that it is extremely difficult to ascertain whether there is uniformity in the proportion or whether, through incompetence, favoritism, or corruption of the assessors, some portions of the taxing body are bearing the others' burdens, as between either individuals or local groups."

Equity will never condone disrespect for the law, for equity follows the law. Equality of treatment and burden is equity; to delay equity is to deny equity.

The majority opinion calls for delaying compliance with the mandate of the statutes until the tax year 1959 so as to afford "the Legislature the opportunity to take such measures and provide for such administrative procedures as its own inquiry may prove to be essential to the public interest, and to allow the Township time needed for the fulfillment of the project." This Court has no right to withhold judgment on statutes which date back to 1875 to give "the Legislature the opportunity to take such measures and provide for such administrative procedures as its own inquiry may prove to be essential to the public interest; and to allow the Township time needed for the fulfillment of the project" at the expense of the plaintiff and other similarly situated taxpayers. The Township, on the other hand, does not need and does not ask for time for "its project." Its reassessment is finished; the time for decision has arrived.

## *Appendix H*

The concurring opinion would give our citizens a "decent opportunity to seek an orderly solution * * * through their elected representatives or by constitutional amendment". But the problem is not a new one. It has long been with us. In one phase or another it has been before this Court for years, beginning with the *Baldwin* case in 1954. Without legislative direction over a hundred municipalities have undertaken a program looking forward to the carrying out of the mandate of the statutes, but they have never given a hint that they intend to comply with the law voluntarily. On the contrary, after arriving at true value they have, with the exception of Princeton Township, arbitrarily fixed a percentage of true value for assessment purposes. The courts have given adequate notice of the requirements of the law and have pointed out the wholesale disregard of it, and still compliance has lagged. In spite of all of this the Legislature has not changed the law, if indeed changes can be made which will improve the laws based on the sound principle of assessment at true value. We must, therefore, apply the law as we find it and not indulge in excuses not even presented to us.

The question before us is whether we will recognize the clear unmistakable mandate of the statutes for assessment at true value and direct performance of the solemn duty of the defendants to assess at true value or ignore it and make ourselves a party to the positive disregard of the statutes. Any such weakness on the part of the Court in enforcing what is clearly the law can lead only to disrespect of its judgment. On the other hand, by insisting on adherence to the standard of true value, we effectuate the purpose and policy of the existing law, extinguish the evils that have grown up from the acceptance of a percentage of true value as an adequate standard of value and make policing of abuses infinitely easier, in the interest of realizing equality of treatment and burden.

I would affirm the judgment below for the reasons expressed herein.

Mr. Justice JACOBS has authorized me to say that he joins me in this dissent.

JACOBS, J., dissenting:

I would affirm for the compelling reasons set forth in the opinion of Judge FRANCIS below. See *Switz* v. *Middletown Tp.,* 40 N. J. Super. 217 (App. Div. 1956). The statutory direction for assessment at true value is unequivocal and long-standing. When duly called upon in an appropriate legal proceeding, our solemn judicial responsibility to insure fair fulfillment of the legislative mandate is entirely clear. To meet practical necessities, the Appellate Division granted a deferment of the effective date of the original order and the record suggests no just need for additional delay in this thoroughly litigated case before us; if perchance any such need should appear, application by the Township and its Assessor for reasonable relief may readily be entertained by the Appellate Division.

WEINTRAUB, J., concurring in result.

*For modification*—Justices Heher, Oliphant, Burling and Weintraub—4

*For affirmance*—Chief Justice Vanderbilt, and Justice Jacobs—2

*For reversal*—Justice Wachenfeld—1

# Appendix I

## Opinion of the Supreme Court of New Jersey (26 N.J. 336)

City of Hoboken, Plaintiff-Appellant, *v.* The Jarka Corporation, Respondent-Respondent, and Division of Tax Appeals, Department of The Treasury, Respondent.

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City of Hoboken, Respondent-Appellant, *v.* International Terminal Operating Co., Inc., Plaintiff-Respondent, and Division of Tax Appeals, Department of The Treasury, Respondent.

Argued February 17, 1958—Decided March 17, 1958.

On appeal from the Division of Tax Appeals, Department of the Treasury.

Mr. Herbert H. Fine argued the cause for appellant.

Mr. Raymond J. Lamb argued the cause for respondents, The Jarka Corporation and International Terminal Operating Co., Inc. (Messrs. Emory, Langan, Lamb & Blake, attorneys; Mr. Raymond J. Lamb, of counsel).

Mr. David D. Furman, Deputy Attorney-General, argued the cause for Division of Tax Appeals, Department of the Treasury (Mr. Grover C. Richman, Jr., Attorney-General of New Jersey, attorney).

The opinion of the court was delivered

Per Curiam. Two errors require reversal of the judgments of the Division of Tax Appeals.

(1) The first is that the Division failed to follow the procedure set forth in *Fifth Street Pier Corp. v. City of Hoboken*, 22 N. J. 326 (1956), in that opportunity was not given to except to the panel report. It should be noted that the Division here took final action before we decided the *Fifth Street Pier Corp.* case.

(2) The second is that although counsel for respondent offered no proof in support of the allegation of discrimina-

tion and at the hearing stated he was limiting the appeals to the issue of true value, yet the Division found discrimination by noticing and applying the Director's equalization table. That course is incompatible with the views expressed in *Delaware, Lackawanna & Western Railroad Co.* v. *Neeld*, 23 N. J. 561 (1957) with respect to the Director's table.

(3) Appellant contends that if the matter is remanded, as we conclude it must be, the issue of discrimination be deemed to have been withdrawn by reason of the circumstances described above. At the time of the hearings before the Division, its jurisdiction to entertain the charge of discrimination was in doubt. Shortly after the hearings closed but before decision, *Gibraltar Corrugated Paper Co.* v. *Township of North Bergen*, 20 N. J. 213 (1955), was decided and therein the Division's jurisdiction was recognized. Although respondent should have applied to reopen the matter when *Gibraltar* was decided, yet we think that under all the circumstances the interests of justice are served by permitting respondent to press that issue upon the remand.

In the light of the foregoing, we should not consider other issues presented on these appeals. However, if there should be appeals from the new judgments of the Division, the parties may use the briefs and appendices now on file with such additions as circumstances may suggest to them, and to that end the briefs and appendices will be preserved for use in the Appellate Division or this Court.

The judgments are accordingly reversed and the matters remanded to the Division for further proceedings not inconsistent with this opinion.

*For reversal and remandment*—Chief Justice WEINTRAUB, and Justices HEHER, BURLING, JACOBS, FRANCIS and PROCTOR—6.

*For affirmance*—None.

# Appendix J

## Opinion of the Superior Court of New Jersey, Appellate Division (45 N. J. Super. 143)

TOWNSHIP OF NORTH BERGEN IN THE COUNTY OF HUDSON, A TAXING DISTRICT OF THE STATE OF NEW JERSEY, APPELLANT, v. OTTO VENINO, JR., AND DIVISION OF TAX APPEALS IN THE DEPARTMENT OF THE TREASURY, RESPONDENTS.

Argued April 29, 1957—Decided May 7, 1957.

Before Judges CLAPP, JAYNE and FRANCIS.

*Mr. Nicholas S. Schloeder* argued the cause for appellant.

*Mr. Thomas M. Venino* argued the cause for respondent Otto Venino, Jr.

The opinion of the court was delivered by

FRANCIS, J. A. D. The Township of North Bergen assessed a parcel of land owned by Otto Venino, Jr., at $18,600 for the year 1955. On appeal the Hudson County Board of Taxation sustained the assessment and further review was pursued in the Division of Tax Appeals. At the hearing there the only testimony adduced by the parties related to the true value of the property. The taxpayer's expert valued it at $10,000, while the proof of the municipality fixed true value at $18,600. After reviewing the evidence, the commissioners composing the panel concluded that the assessment was not in excess of true value and that the order of the county board in that respect should be sustained. However, finding that the petition of appeal charged discrimination, they took official notice of the final 1955 equalization table for Hudson County as promulgated by the Division of Tax Appeals, *N.J.S.A.* 54:3-17, 54:2-37, and of the table of equalized valuations issued by the Director of the Division of Taxation in connection with the apportionment of school aid, *N.J.S.A.* 54:1-35.1 *et seq.* More specifically, notice was taken that in the former the ratio of assessments to true value in North Bergen appeared as 53.12%, and in the latter as 52.63%. On the basis of these ratios alone, the Division decided that assessment of the taxpayer at true value constituted discrimination and therefore reduced the valuation to 53% thereof or $9,900. This appeal assails the legal propriety of the order.

[1] At the outset of its argument the municipality questions whether the petition of appeal to the Division raises the issue of discrimination. It is true that the language employed therein is general and somewhat ambiguous, but coupled with the taxpayer's statements at the hearing it seems sufficient to justify consideration of the problem. However, for guidance of the bar attention is called to the need for a proper claim of discrimination, *Cleff Realty Co. v. Jersey City*, 41 *N. J. Super.* 465 (*App. Div.*), certification denied 23 *N. J.* 58 (1956), and to a form of allegation thereof which was considered adequate in *Gibraltar Corrugated Paper Co. v. North Bergen Twp.*, 20 *N. J.* 213, 217 (1955). The current tax ferment makes fair notice to the municipal authorities a reasonable necessity.

[2-4] This brings us to a consideration of the merits of the appeal. May the tables described be used as the sole reason for a finding of discrimination? And, where such tables are offered or used as the *sole* means of demonstrating discrimination against an individual property owner, may the average ratio of assessment to true value as shown therein be applied to the actual true value of the individual parcel of realty in order to achieve equality and eliminate discrimination? The answers to these questions must be in the negative. Such treatment fails to take cognizance of the essential difference between the concepts of average ratio of assessment to true value for equalization table

purposes and common ratio of assessment. The average ratio achieved in the statutory equalization process is the arithmetical mean of the varying percentages of true value applied by the local assessor in assessing properties in the taxing district. A common ratio signifies that the same standard or percentage of value is used in assessing each property in the district. If the same standard or common ratio were applied uniformly in all municipalities throughout the State, there would be no need for equalization tables (assuming, of course, that true value was ascertained honestly and in good faith), for then there would be no discrimination. Obviously, therefore, application of the average ratio, ascertained for purposes of equalizing the county tax burden among municipalities or for purposes of allocation of school aid, cannot bring about equality of tax burden among individual property owners within a given municipality. A common level of individual assessment cannot be achieved by that means *alone. Switz v. Middletown Twp.*, 23 *N. J.* 580, 593, 594, 596 (1957); *Delaware, L. & W. R. R. v. Neeld*, 23 *N. J.* 561, 572-574 (1957). This is not to say that such tables are not admissible in discrimination cases. In company with other competent evidence of unequal treatment of an individual property owner, they may bring the sum total of the proof to the probative force necessary to demonstrate discrimination.

[5] In the present case, as already indicated, the only proof offered showed a conflict of opinion as to true value. The record reveals neither discussion of, nor reference to, the equalization tables at the hearing. (Note the practice outlined in *City of Passaic v. Passaic County Bd. of Taxation*, 18 *N. J.* 371, 396 (1955), with respect to their use in county equalization table proceedings.) Counsel for the taxpayer at the oral argument advised us that he wished to

stand on the record as it now appears and to rely on the right of the Division to reduce an assessment by reference to the table ratios alone.

Under the circumstances, the order is reversed and the municipal assessment is reinstated.

# Appendix K

## Opinion of the Superior Court of New Jersey, Appellate Division (47 N. J. Super. 571)

JAT COMPANY, INC., A CORPORATION OF NEW JERSEY; ADOLPH ZUCKERBERG, PLAINTIFFS-APPELLANTS, v. DIVISION OF TAX APPEALS OF THE STATE OF NEW JERSEY AND TOWNSHIP OF SADDLE BROOK (FORMERLY TOWNSHIP OF SADDLE RIVER), A MUNICIPAL CORP. OF NEW JERSEY, DEFENDANTS-RESPONDENTS.

Argued October 28, 1957—Decided November 29, 1957.

Before Judges GOLDMANN, FREUND and CONFORD.

*Mr. Ralph W. Chandless* argued the cause for plaintiffs-appellants (*Messrs. Chandless, Weller & Kramer,* attorneys).

*Mr. Charles L. Bertini* argued the cause for defendant-respondent Township of Saddle Brook (*Mr. Guy W. Calissi,* attorney).

The opinion of the court was delivered by

CONFORD, J. A. D. This appeal raises the question of the correctness of judgments of the State Division of Tax Appeals fixing assessments for taxation of six parcels of real property in the Township of Saddle Brook (formerly Saddle River) for the tax years 1954 and 1955. Two of the parcels are owned by appellant Jat Company, Inc., and the other four by appellant Zuckerberg. The Bergen County Board of Taxation had, on appeal, granted the taxpayers substantial reductions from the assessments, apparently on the theory of discriminatory assessment. The reductions were wholly reversed by the State Division as to some of the parcels and modified as to others. On the present appeals the taxpayers press the contention that they proved a case of discriminatory assessment before both the county and state tax agencies, within the decisions in *Baldwin Con-*

*struction Co. v. Essex County Board of Taxation*, 16 N. J. 329 (1954), and *Gibraltar Corrugated Paper Co. v. North Bergen Township*, 20 N. J. 213 (1955), and that the revision of the county board judgments by the State Division was erroneous.

A brief description of the properties involved will be useful. Lot 1, Block 157 (4 acres) and Lot 4, Block 153 (2.74 acres) abut each other, north-south, being on the west side of North Midland Avenue and bounded by a railroad right of way on the west. On Lot 1 there is a store building. The other lot is vacant. These properties are zoned industrial, but there is a small tract developed with residences immediately south of Lot 4. The other properties under appeal all lie east of North Midland Avenue, the nearest to that thoroughfare being Lot 1, Block 154 (3.49 acres), the next, Lot 2, Block 154 (21.96 acres), and then Lot 3, Block 154 (21.65 acres). A slaughterhouse business has been conducted on Lot 2 for many years. The other lots mentioned are vacant land. Lot 1 is zoned industrial, Lots 2 and 3 residential. Skirting these lots on the south and traversing part of Lots 3 and 2 is the Garden State Parkway, according to the Township Zoning Map in evidence. The last parcel involved is Lot 1, Block 159 (19.18 acres), directly north of Lot 2, Block 154, zoned residential and apparently adjacent to a school and developed residential area. This is also vacant land.

A witness for the taxpayers testified that prior to the making of the 1954 assessments, the Township of Saddle Brook made a general revaluation study of taxable property in the municipality and that this resulted in assessment increases for that tax year over the tax year 1953 of from $10 to $300 as to 2,200 assessed parcels and from $2,000 to $40,000 as to 50 parcels, the remaining 700 assessed properties being either reduced or left unchanged. The 50 properties mentioned absorbed an aggregate increase of $400,000 of the total net increase of all ratables of $550,000.

The properties involved in the present case are said to fall in this class of 50. The same witness, William J. Schwenn, a real estate valuation expert, further testified that he had made a general study of the relationship of assessed valuations to true value of property in Saddle Brook as of prior to the tax year 1954, based upon his analysis of 400 sales of residential property, and that this disclosed that "these residential properties were assessed approximately 20% of true value." From this premise the witness gave it as his conclusion that there was a general assessing standard of 20% of true value in use by the assessors of the municipality prior to 1954; and that this standard continued in 1954 and 1955 except as to the properties involved in this appeal and a few others. It was his own opinion that the subject properties had been assessed at 20% of true value prior to 1954. Taxpayers consequently argue that the increases in their assessments (applied in the tax year 1955 as well as 1954) are discriminatory and that the reductions granted by the county tax board, which were almost to the level of the 1953 figures, should have been affirmed. Schwenn gave his expert appraisal as to the true value of each of the properties as of the assessing dates for the tax years in question, and it is clear that application of a 20% ratio thereto would produce a figure in each case except one substantially in accord with the reduced assessments fixed by the county tax board. It is equally clear, however, that such figures would generally have exceeded the 1953 assessments (see table, *infra*).

The municipality, which had appealed the county board judgments, offered the testimony of a real estate expert, Charles Raia, as to the true value of the properties involved. His valuations were generally substantially in excess of the true value appraisals given by Mr. Schwenn. The municipality offered no testimony concerning the method by which these properties, or property in the township generally, was assessed in either of the years in question or for prior years.

After hearing the evidence, a two-member panel of the Division of Tax Appeals filed a report, which was adopted as a basis for judgments by the Division, in which the following conclusions were arrived at: (1) it was not shown that Saddle Brook assessments as of prior to 1954 were generally fixed by the assessors at a uniform standard of 20% of true value; (2) that nevertheless, despite the absence of a showing of "direct or deliberate discrimination," the Division would apply to the true value of the properties what it referred to as "the common level." This was a misnomer, since it appears that by this it meant the *average* ratio which aggregate assessed valuations bore to aggregate true value of all property assessed. It decided to use for this purpose the average ratios which the Division had itself arrived at on review in other proceedings of th Bergen County Equalization Tables for the years 1954 and 1955, being, respectively, 21.8% and 20.2%. It then proceeded to make a determination of the true value of the respective properties, which it considered to be the same, as to each parcel, for both of the tax years in question. This was done upon an analysis of the appraisals and supporting testimony of the opposing experts and the placing thereon of the probative weight deemed deserved. To the true value determinations thus found the panel then applied the ratios mentioned and entered the resulting figures in each case as the recommended judgments, except where any such figure would exceed the amount of the assessment. These recommendations were the basis of the judgments under appeal. The appended table will show, for each of the properties in litigation, the 1953 and 1954 assessments, the judgments of the county board and of the State Division, and the true value appraisals of the experts. All 1954 figures apply also to the year 1955, except where otherwise specifically indicated.

## Appendix K

| *Lot* | *1953 Ass't.* | *1954 Ass't.* | *1954 Co. Bd.* | *1954 St. Bd.* | *Schwenn* | *Raia* |
|---|---|---|---|---|---|---|
| Lot 4, Bl. 153 | $825 | $6,436 | $1,025 | $3,086<br>(2,767 - '55*) | $5,480 | $19,100 |
| Lot 2, Bl. 154 | 6,173-12,840 (I**) | 17,850-30,150 (I) | 7,700-16,000 (I) | 16,786-17,483 (I)<br>(15,554-16,200-'55) | 37,400-80,200 (I) | 110,000-197,000 (I) |
| Lot 3, Bl. 154 | 4,400 | 8,640 | 5,500 | 8,640 | 27,500 | 86,500 |
| Lot 1, Bl. 159 | 3,500 | 10,055 | 4,400 | 10,055 | 22,800 | 95,900 |
| Lot 1, Bl. 154 | 1,050 | 4,560 | 1,300 | 3,811<br>(3,531 - '55) | 7,000 | 24,000 |
| Lot 1, Bl. 157 | 1,600-1,300 (I) | 8,800-3,000 (I) | 2,000-1,700 (I) | 4,360-3,000 (I)<br>(4,040 - '55) | 10,000-18,400 (I) | 28,000-11,900 (I) |

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* Note: "'55" refers to 1955 judgment.
** Note: "I" refers to assessment on improvement.

## *Appendix K*

### I.

[1] It is to be noted that the municipality has not appealed from the judgments entered by the Division of Tax Appeals. Since the Division entered judgments based upon ratios substantially the same as that which the taxpayers contend was the common level applied in Saddle Brook to property other than theirs, it does not appear that they have any remaining grievance, even assuming their claim of first-instance discrimination is otherwise well founded, except to the extent that they may have any quarrel with the true value determinations arrived at by the Division as a preliminary basis for application of the average ratios. The merits of the true value determinations do not seem seriously questioned by the taxpayers in the points of argument stated in their brief, nor was this question stressed in the oral argument. There is, however, mention in the Statement of Questions Involved of alleged deficiency in the appraisals of the municipal expert because of absence of reliance upon sales of comparable property. We have examined the panel report and find that the valuation testimony of both experts was given critical study before use as a basis for the valuation determinations in the report, and we find no persuasive showing of error in the valuations determined by the panel, insofar as true value may be material in this case. *Aetna Life Insurance Co. v. City of Newark*, 10 *N. J.* 99, 104 (1952).

[2] Since, moreover, the taxpayers are not entitled, even from a discrimination standpoint, to anything more than the application of a supposedly commonly applied assessment ratio to the *true value* of their property, rather than to their own expert's private opinion of such value, and the Division has, in effect, done this by the application of the ratios mentioned to the Division's determinations of true

value, there would appear to be no material basis to the grievance purportedly sought to be vindicated by this appeal and no prejudice in the rejection by the Division of the contentions of taxpayers as to discrimination.

## II.

[3, 4] We prefer not to rest an affirmance of the judgments under appeal on the point developed in I, *supra*, as the application of the "average" ratios by the Division to true value was improper, even though the taxing district has not appealed therefrom. *North Bergn Township v. Venino*, 45 *N. J. Super.* 143 (*App. Div.* 1957). As was pointed out by Judge (now Mr. Justice) Francis in that case (45 *N. J. Super.* at *page* 147), "the average ratio achieved in the statutory equalization process is the arithmetical mean of the varying percentages of true value applied by the local assessor in assessing properties in the taxing district." Such a ratio is distinctly not to be equated with a "common ratio" properly understood, which signifies that "the *same standard* or percentage of value is used in assessing *each property* in the district" (emphasis supplied), *ibid.*; and see *Switz v. Middletown Township*, 23 *N. J.* 580, 595 (1957). The Division is not a liberty, in any case, as the law now stands, to enter judgments at percentages of true value based upon "average ratios" of assessment, where there is nothing more to support the case for discrimination than the determination of such a ratio, no matter by whom established. *North Bergen Township v. Venino, supra.*

[5, 7] The inquiry next suggests itself as to whether any showing of discrimination in the legally significant sense was developed by the proofs of the taxpayers which were submitted before the Division for that purpose. Before

considering the proofs it is well to be reminded that the authorities thus far have enunciated two requirements for such a showing: (a) that the assessing authorities are applying a *common or general* standard of valuation in the general administration of their assessing function, whether that standard is pursuant to or in violation of any statute, and (b) that one or a relatively few taxpayers are being systematically or intentionally singled out for subjection to a more burdensome assessment standard than that being generally administered. See *Delaware L. & W. R. R. Co. v. Neeld*, 23 *N. J.* 561, 570 (1957); *Baldwin Construction Co. v. Essex County Board of Taxation, supra* (16 *N. J.*, at *pages* 338, 340-342); *Gibraltar Corrugated Paper Co. v. North Bergen Township, supra* (20 *N. J.* at *page* 219); *Jersey City v. Division of Tax Appeals*, 5 *N. J. Super.* 375, 384 (*App. Div.* 1949), affirmed 5 *N. J.* 433 (1950). In the *Baldwin case* (16 *N. J.* at *pages* 340, 341) and in the *Delaware L. & W. R. R. Co. case* (23 *N. J.* at *pages* 569-571), the court announced that the New Jersey constitutional requirement for taxation of all real property assessed for the support of local government "according to the same standard of value," *Article* VIII, *Section* 1, *paragraph* 1, implied the dominant principle of "equality of treatment and burden"; that this provision constitutes the New Jersey State sanction against discriminatory assessment; and that the principle stated is essentially the same requirement as is enforced against the states by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, applied in such cases as *Hillsborough Township v. Cromwell*, 326 *U. S.* 620, 66 *S. Ct.* 445, 90 *L. Ed.* 358 (1946); *Sunday Lake Iron Co. v. Wakefield Township*, 247 *U. S.* 350, 38 *S. Ct.* 495, 62 *L. Ed.* 1154 (1918); *Sioux City Bridge Co. v. Dakota County*, 260 *U. S.* 441, 43 *S. Ct.* 190, 67 *L. Ed.* 340

(1923). We ought not to leave without note in this context that the 1947 New Jersey constitutional provision is effective to prohibit *legislation* which would prescribe different standards for assessment of real property taxed for the support of local government, and was adopted primarily with that object in mind, 1 *Convention Proceedings, Record,* pp. 773 *et seq.,* whereas the Equal Protection Clause is aimed at discriminatory action by the states, whether by statute or administrative action.

If either of the two aforestated requirements is absent in a particular case, there is no factual basis for a contention of discrimination in the legally significant sense. A failure of proof as to the first requirement is clearly manifested in the case for discrimination attempted to be constructed by the present taxpayers. Perusal of the entirety of the testimony of their witness, Schwenn, indicates that the 20% ratio which he implied was one of general application in the taxing district was, in fact, the witness' computation of an *average* ratio, since he mentioned that particular sales prices showed assessment ratios running as low, in some cases as 17%, 15%, and 4%, and as high as 180%. This is the same kind of average ratio as was referred to above as in use for county equalization purposes and which recently has been required by law to be formulated by the State Division of Taxation in connection with the State School Aid Law. There being no other pertinent proof in the record, there was no basis for the Division, and there is none for us, to find the existence either prior or subsequent to October 1, 1953 of any particular *commonly applied* standard of value for the assessment of property in Saddle Brook. The references in the proofs to as assessment revaluation in 1954 suggest the possibility that a common standard was begun to be applied uniformly at that time, but there is no definite proof in this record indicative thereof or as to what any such standard might have been. If, as may be, it was 20% of true value, we have already noted that appellants have been substantially accorded the benefit of it by the judgments here under review.

Nor do we find satisfaction by the taxpayers of the second requirement for a discrimination case, *i.e.*, proof of the direction of a systematic or intentional scheme of discrimination against their properties. They attempt a demonstration of what they denominate "discrimination" by pointing out that in effect the 1954 assessment increases it resulted that Lot 4, Block 153, was being assessed at $11.50 per front foot, while the next three properties adjoining southerly were assessed at rates of $2.25, $4 and $6 per front foot, respectively. But the tax map show that while Lot 4, Block 153, is a 2.74-acre parcel with a street frontage of 556 feet and depths of 170 feet and 260 feet, with all the depth and assemblage advantages normally accruing to an industrial location of that size, the compared adjoining parcels are small dwelling plots with frontages of 40, 50 and 100 feet, respectively, and depths of 100 feet. It is obvious that these are not comparable properties. In any event, the Division judgment reduced the assessment of Lot 4, Block 153, by more than 50%, so that there is not now even a colorable showing of discrimination in the comparison.

Taxpayers undertook demonstration of another instance of the same kind by noting that the increased assessment of Lot 1, Block 157, left it at a front foot rate of $15.50, whereas the adjoining property on the north was assessed at $8 per front foot. But here, again, note the contrast between the 4-acre area of the parcel under appeal (adjoining on the north the parcel discussed in the preceding paragraph), having dimensions of 568′ by 260′, and the

.58-acre piece compared with it, having a frontage of only 132 feet. Consider, moreover, that Lot 1, Block 157, was also reduced in assessment by the Division judgment by one half, thereby eliminating any vestige of a claim of disparate assessment ratios.

[8] It must, furthermore, be kept in mind that a showing of spot disparity in apparent assessment valuation rates, limited to isolated or relatively small area pockets, is far from establishing such discrimination as would justify a tax board or court, under the principles stated above, in reducing the parcel assessed commensurately higher. So soft a concept would soon lead to administrative choas in the attainment of practical assessment uniformity and would tend to frustrate the long-range aim of reasonably consistent adherence by assessors to whatever the legal valuation standard of assessment may be ordained to be as of any particular time. See *Switz v. Middletown Township, supra, passim.* It was not held in the *Baldwin* case, *supra,* as implied by appellants, that the assessment of a particular property should be reduced for no other reason than an apparent relative disparity with the assessment of an adjacent or nearby parcel. It was there expressly found as a fact that there was a *common ratio of value* applied in East Orange generally, and that the revision action of the county tax board invalidated as discriminatory in that case was confined to properties in a geographical area arbitrarily fixed by the board, thus deliberately subjecting those properties to a higher relative burden than that which had previously been generally administered throughout the taxing district. (16 *N. J.,* at *page* 338).

[9] We are not implying that there are any necessarily predetermined or absolute criteria as to the required terri-

torial extent of either the favored or the discriminated against properties in order to justify grant of relief in a particular discrimination case. The broad outlines of the requirements for a successful showing have been drawn by our Supreme Court in the cases cited and they will undoubtedly be applied with reasonable flexibility. They are not met by the proofs in the case before us.

[10-12] In evaluating the proofs before us we have regard for the caveat that: "mathematical precision in the valuation of property for taxation is not requisite, nor is it attainable. Absolute equality is impractical." *Delaware L. & W. R. R. Co. v. Neeld, supra* (23 *N. J.*, at *page* 570). "Protection against intentional systematic discrimination" is the objective of the particular sanction against illegal taxation which is commonly known as discrimination appeal. *Ibid.* It has been repeatedly held that the equal protection clause is not designed to cure "inequality in taxation which results from mere mistake or error in judgment of tax officials." *Charleston Federal Savings & Loan Ass'n. v. Alderson*, 324 *U. S.* 182, 190, 65 *S. Ct.* 624, 89 *L. Ed.* 857 (1945), and cases there cited. *Cf. Hudson & Manhattan R. R. Co. v. City of Jersey City*, 6 *N. J. Super.* 333, 338, 339 (*App. Div.* 1950), affirmed 5 *N. J.* 434 (1950). We may add that it is equally inefficacious to repair the anarchic situation unfortunately present in too many taxing districts under which property is assessed not only without regard to existing statutory standards but without relation to any known or ascertainable standard other than the assessor's esoteric concept of what is expedient. Remedies for those kinds of assessment shortcomings must continue to be sought in better administration of the assessment process; in judicial or *quasi*-judicial compulsion of adherence by assessors in particular cases to the statu-

tory standards ordained for assessment; and in legislative attention to standards which appear from experience to be impracticable. *Switz v. Middletown Township, supra, passim.*

## III.

[13] Certain procedural objections to the action of the Division are advanced. It is contended, first, that the petitions of appeals of the taxing district fail to vest jurisdiction in the Division, as they request an increase of the assessments to true value, whereas the successful appeal of the taxpayers to the county board was for relief for discrimination. See *Cleff Realty Co. v. Jersey City*, 41 *N. J. Super.* 564 (*App. Div.* 1956). In the cited case it was held that where a taxpayer's appeal to a county board is confined to a claim of assessment above true value, there is no jurisdiction in the State Division, upon the further prosecution of the appeal to that body, to consider a claim of discrimination. In the present case there was no violation of that principle. The demand in the taxing district's petitions of appeal for a restoration of true value was consistent with a legal assault upon the grant of relief by the county board based upon discrimination. The State Division found that the case for discrimination, upon which the county board judgments were apparently based, was not established by the proofs adduced before it. That the Division did not thereupon restore the assessments in full but gave the taxpayers the benefit of application of average ratios to true value, as determined from the valuation proofs, was to the benefit of the taxpayers, and cannot be a cause for complaint by them on this appeal.

[14, 15] It is further contended that the burden of proof rested upon the municipality to overcome, in the Division,

the presumption of correctness attending the action of the county board, and that the appellant municipality failed to submit proofs having that effect before the Division. *North Bergen Township v. Dieckmann's Estate*, 37 *N. J. Super.* 221, 223 (*App. Div.* 1955). *Cf. Aetna Life Insurance Co. v. City of Newark, supra.* It may perhaps be questioned whether the rule relied upon is appropriately applicable in a case where so serious a departure from ordinary assessing practice as unconstitutional discrimination is the issue presented to and decided by the county board, particularly where, as here and customarily, that tribunal files no findings of fact or conclusions of law and there is no record of the evidence before it. But we need not determine the point in the present case. It was conceded at the argument that the taxpayers' case before the county board consisted of testimony by the same witness and presumably of the same import as shown in the record made before the State Division. The Division, and this court, are thus apprised of what the basis for the county board judgments consisted of. The entire factual situation deemed by taxpayers pertinent to a resolution of the meritorious issue is here laid bare. The presumption always is that the actions of assessing officials are correct and free from invidious discrimination. *Jersey City v. Division of Tax Appeals, supra* (5 *N. J. Super.*, at *page* 384). It would not serve the interests of justice to sustain the county board determination of illegal discrimination when the evidence in the record before us, all that the complaining taxpayers are able to muster, fails to show it by the remotest approximation of what the rule requires.

Moreover, it does not appear that taxpayers addressed any motion at the hearing before the State Division to the insufficiency of the proofs of the taxing district before going on with their own proofs.

Affirmed.

# Appendix L

## Majority Opinion of Division of Tax Appeals

DEPARTMENT OF THE TREASURY
STATE OF NEW JERSEY
DIVISION OF TAX APPEALS

◆

CITY OF JERSEY CITY,
Petitioner,
*vs.*
THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,
*vs.*
DIRECTOR, DIVISION OF TAXATION AND THE CITY OF JERSEY CITY,
Respondent.

◆

*Appearances*:

Leo Rosenblum, Esquire, for the City of Jersey City.

Joseph C. Glavin, Esquire, for the Pennsylvania Railroad Company.

Thomas P. Nolan, Deputy Attorney General, for the Director, Division of Taxation.

## *Appendix L*

Wiener, Commissioner: This matter comes before the Division as a result of a motion by the City of Jersey City seeking the dismissal of the discrimination phase of the above cases upon the ground that the evidence produced upon trial even if true fails to establish any basis in law for relief.

The Pennsylvania Railroad Company hereinafter referred to as Pennsylvania filed complaints with the Division of Tax Appeals pursuant to R.S. 54:29A-31 contesting the validity of the 1953, 1954 and 1955 Class II railroad land assessments in the City of Jersey City. In 1956 Pennsylvania filed a similar complaint but for that year relief was sought from alleged over-assessments of structures as well as land. In each of the years 1953 through 1956 Jersey City also filed appeals in which it was alleged that the assessments were below true value as to both land and structures.

Not only did Pennsylvania assert that its Class II property was assessed in excess of true value but it put forth the further claim that all of its assessments were discriminatory and unconstitutional in that it was assessed at a higher level than other local taxpayers in Jersey City, as a result of which it sought a reduction below true value to the extent necessary to eliminate such discrimination.

By authority of R.S. 54:2-18 the duty of taking testimony in all these appeals was referred by the Division of Tax Appeals to a Panel consisting of President Labrecque and Commissioner Wiener. In determining the procedure to govern the conduct of the trial, the Panel directed that Jersey City first present its proof upon the valuation of structures for the years *1953 and 1954* after which Pennsylvania was to enter its defense thereto. Upon completion of the structure case, Pennsylvania was then required to present its proofs under its complaint of discrimination, after which it was required that Jersey City present its defense to the discrimination claim. Upon conclusion of the entire discrimination case, Pennsylvania was then to proceed with its proof upon its complaint that the land valuations were in excess of true value and in conclusion Jersey City was then required to present its proofs upon land values.

In keeping with these procedural requirements, Jersey City first submitted evidence concerning structure valuations for the years 1953 and 1954. In presenting its defense thereto, Pennsylvania maintained that it should be permitted to show discrimination in structure assessments for 1953 and 1954 even though it had not filed any appeals therefrom. The Panel ruled that although Jersey City was the only litigant to complain of structure assessments in 1953 and 1954, Pennsylvania would be permitted an opportunity to establish discrimination in order to insure that no increases in structure assessments for those years would be granted above such level as would be necessary to eliminate discrimination, if any.

At the conclusion of the complete structure case, in the course of which Pennsylvania presented certain evidence upon the subject of discrimination, the Panel closed the record upon this phase of the litigation and directed counsel to submit briefs in support of their respective claims. These issues relating to the valuation of the structures are presently pending and undetermined. The City's brief has been filed, and the Panel is awaiting that of the railroad.

The hearing of the structure case thus having been completed, on September 4, 1957, the Panel again convened for the purpose of hearing the separate issues of (a) discrimination and (b) true value upon the land assessments only. In accordance with the predetermined procedure. Pennsylvania presented evidence solely upon the question of discrimination after which Jersey City entered its defense on this limited issue. In the course of this proceeding the Panel determined that any evidence already presented defensively by Pennsylvania in the structure case bearing upon the question of discrimination would be available to it in support of its entire discrimination case. Both Pennsylvania and Jersey City have made it abundantly clear upon the record that they have completed their presentation of discrimination proofs. The Panel accordingly closed this phase of the case and proceeded to the trial of the issues of land valuations which is still in progress.

At the request of both counsel, the transcript of testimony covering the proofs as to discrimination were placed in the formal records of this Division and marked Exhibits A and B.

In the absence of Counsel complying with the direction of the President of the Division that the Division be notified by letter, stating the pages of the testimony to be included under Exhibits A and B, we have considered the entire record as it pertains to discrimination as constituting Exhibits A and B.

On January 3, 1958 Jersey City moved before the Division of Tax Appeals sitting *en banc* for an order dismissing so much of the complaints by Pennsylvania as alleged discrimination upon the ground that the evidence produced upon trial fails to establish "any basis in law for relief upon said ground." Pennsylvania resisted the motion for the reason, among other things, that Jersey City's motion was premature in that the trial of both causes of action; i.e., discrimination and true value in substance presented but a single issue. It was also argued that no decision should be reached upon the discrimination question unless and until the trial of the issue of true value of the land in question was completed. This presents a procedural question which should be disposed of before consideration of the meritorious question raised by the motion.

It has been established in New Jersey with judicial certainty that a charge of discrimination in a tax case presents a different cause of action than that asserted in the conventional claim that property is assessed in excess of true value. *Cleff Realty Co.* v. *Jersey City,* 41 N. J. Super 465, 471 (App. Div. 1956), certification denied, 23 N. J. 58 (1956). To like effect are the decisions of the Appellate Division in *Hackensack Water Company* v. *Township of North Bergen,* 8 N. J. Super. 139 (App. Div. 1950), and *Heather Holding Co.* v. *Division of Tax Appeals,* 36 N. J. Super. 195 (App. Div. 1955). It is the spirit and intent of the rules governing the courts of New Jersey, that where multiple claims or causes of action are presented by a single complaint, under certain circumstances the adjudication of a single cause of action need not necessarily await the conclusion of the trial upon the issues raised by all causes of action. R.R. 4:55-2. *Mortgage Corp. of N. J.* v. *Aetna Cas. & Surety Co.,* 19 N. J. 24, 28 (1955) serves to illustrate the circumstances under which a trial court properly disposed of a cause of action upon motion prior to the completion of testimony upon the issues involved in a separate cause of action. The decision as to whether a single cause of action shall be disposed of on motion prior to the completion of the entire case appears to reside in the sound discretion of the trial court.

The cause of action involving the question of discrimination in the subject cases is of an important nature and if sustained, would probably result in a substantial reduction of the assessments in question. The record upon the question of discrimination alone has consumed over 1100 pages of testimony and upon the same question voluminous exhibits have been introduced. Both sides have concluded their submission of proofs on discrimination and at least, with respect to this cause of action, the record has been officially closed. The question is undoubtedly ripe for a prompt determination and no useful purpose can possibly be served by delaying consideration of the merits of the discrimination case until the land valuation trial has been concluded. Based upon the broad experience that the Division has had in railroad cases in the past, it is reasonable to assume that thousands of pages of testimony are yet to be taken on the question of land valuations of which not one word can possibly shed any further light toward the solution of the discrimination problem. We are not unmindful of the fact that by our own procedural requirements we segregated the trial of the discrimination case from that of the true value case by requiring that Jersey City tender its proofs in defense of discrimination before any phase of the land true value case commenced. Under all of the circumstances, it would appear to be in the sound exercise of our discretion to determine Jersey City's motion upon the merits.

In substance, Pennsylvania's claim of discrimination is based upon its contention that the assessments made by the Director are at or above the standard of true value, while the assessments of other real property in Jersey City are based on standards of value which are considerably below true value. It is claimed that this creates unconstitutional discrimination against Pennsylvania so as to entitle it to a decrease from true value down to the level of other assessments in the taxing district.

Since *Gibraltar Corrugated Paper Co.* v. *North Bergen Township*, 20 N. J. 213 (1955) it is unquestioned that the Division of Tax Appeals has jurisdiction to remedy discriminatory assessments, and even prior to that decision the Division of Tax Appeals in a second-class railroad case, as distinguished from a county tax board in a local assessment case, had clear statutory authority to correct, adjust and equalize a discriminatory assessment. R.S. 54:29A-33.

The factual proofs required in support of a claim for discrimination present a more difficult problem, and our recent decisional law upon the subject indicates a judicial awareness of the complexities which arise thereby. *In Delaware, Lackawanna & Western RR Co.* v. *Neeld,* 23 N. J. 563 (1957) the Supreme Court reversed a decision by the Superior Court, Law Division, which had held that proof of the average ratios of assessments to sales prices in a taxing district, as determined by the Director of the Division of Taxation for school aid purposes under R.S. 54:1-35.1, without anything more, justified a reduction to that level from the predetermined true value of the property in question. The opinion of Mr. Justice Heher declared:

> "Where one or a few of a class of taxpayers are assessed at the full true value of their property, according to a constitutional or statutory mandate, and the rest of the class are intentionally assessed at a percentage of true value, in violation of the law, the 'right of the taxpayer whose property alone is taxed at 100% of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirements of the statute'; where 'it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.' *Sioux City Bridge Co.* v. *Dakota County,* 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979 (1923). See also *Iowa-Des Moines National Bank* v. *Bennett,* 284 U. S. 239, 52 S. T. 133, 76 L. Ed. 265 (1931); *Cumberland Coal Co.* v. *Board of*

> *Revision*, 284 U. S. 23, 52 S. Ct. 48, 76 L. Ed. 146 (1931)."

The opinion goes on to state:

> "But mathematical precision in the valuation of property for taxation is not requisite, nor is it attainable. Absolute equality is impractical. The design of the equal protection clause of the Fourteenth Amendment, related to the particular field, is protected against intentional systematic discrimination, and thus to insure the essence of the basic right of equality; mere errors of judgment are not enough; there 'must be something more,—something which, in effect, amounts to an intentional violation of the essential principle of practical uniformity.' *Sunday Lake Iron Co.* v. *Wakefield Township*, 247 U. S. 350, 38 S. Ct. 495, 62 L. Ed. 1154 (1918); *Sioux City Bridge Co.* v. *Dakota County*, cited supra."

On the question of the use of State school aid ratios in sole support of a discrimination case, Mr. Justice Heher pointed out:

> "There is an essential difference between a common or uniform assessment ratio of true value applicable to all alike in the same class and the 'average' assessment ratio of true value. The 'common' ratio imports general equality in the incidence of the tax, the equality of burden that is of the essence of constitutional uniformity; the 'average' ratio is the arithmetical mean or median of varying ratios of true value, necessarily making for unequal proportions of value and thus for inequality of treatment and burden in the apportionment of the tax as between the sev-

eral property owners. *Switz* v. *Township of Middletown,* this day decided, 23 N. J. 580 (1957)."

Any remaining doubt concerning the use of State school aid ratios without anything more in support of a discrimination case was completely dissolved with the decision in *North Bergen Township* v. *Venino,* 45 N. J. Super. 143 (App. Div. 1957), wherein Mr. Justice Francis (then Judge) held that the average ratio achieved in the statutory equalization process "is the arithmetical mean of the varying percentages of true value applied by the local assessor in assessing properties in the taxing district." On the other hand, Mr. Justice Francis said that a "common ratio signified that the same standard or percentage of value is used in assessing each property in the district." The opinion then declares: "This is not to say that such tables are not admissible in discrimination cases. In company *with other competent evidence of unequal treatment of an individual property owner, they may bring the sum total of the proof to the probative force necessary to demonstrate discrimination.*"

The Appellate Division recently summarized the law thus far developed in this difficult field in the case of *Jat Company, Inc.* v. *Division of Tax Appeals,* 47 N. J. Super. 571 (App. Div. Nov. 29, 1957). After restating the law of *Venino* to the effect that the Division of Tax Appeals cannot enter judgments in discrimination cases on percentages of true value based solely upon "average ratios," Judge Conford pointed out at page 581:

> "the authorities thus far have enunciated two requirements for such a showing: (a) that the assessing authorities are applying a common or general standard of valuation in the general administration of their as-

> sessing function, whether that standard is pursuant to or in violation of any statute, and (b) that one or a relatively few taxpayers are being systematically or intentionally singled out for subjection to a more burdensome assessment standard than that being generally administered."

Then, at page 582, Judge Conford declared that "if either of the two aforestated requirements is absent in a particular case, there is no factual basis for a contention of discrimination in the legally significant sense."

All of the current authorities on discrimination were again reviewed by the Supreme Court as recently as February 17, 1958 in *Central Railroad Compay of New Jersey* v. *Neeld* (Case A-62 not yet officially reported). In that opinion, Mr. Justice Jacobs traced developments in Class II railroad discrimination proceedings before the Director of the Division of Taxation after the decision in *D. L. & W.* v. *Neeld, supra.* He pointed out that Director Neeld, after recognizing the Supreme Court's ruling that he was empowered and required to make his final assessments "at the common level of assessment prevailing in the respective taxing districts" found that, "at no time during the hearings before him (Director Neeld) had any proof been adduced to show such common level of assessment." Moreover, the opinion quotes from Director Neeld to the effect "that the railroads have failed to introduce any proof as to true value or common level of assessment and that no yardsticks were presently available from which he can make a proper determination of common level of assessment." Significantly, Mr. Justice Jacobs cites the opinion of Judge Conford in *Jat Company, Inc.* v. *Division of Tax Appeals, supra;* and the railroads are enjoined that "The burden of introducing adequate valuation and other relev-

1952 to June 30, 1953, 1,594 sales at a ratio of 59.3 per cent; from July 1, 1953 to June 30, 1954, 1,498 sales at a ratio of 57.8 per cent; from July 1, 1954 to June 30, 1955, 1,629 sales at a ratio of 57.9 per cent and from July 1, 1955 to December 31, 1955, 956 sales at a ratio of 58.2 per cent. A recapitulation of all sales included in the study from July 1, 1946 to December 31, 1955 (16,091) shows a total consideration paid of $229,485,673. which, when divided into total prevailing assessments at the time of sale in the sum of $151,162,039., produces an overall average ratio of assessments to sales prices of 65.9 per cent.

In another exhibit (PRR A-7) Mr. Stewart attempted to analyze the same sales in the light of the classification formula used by the Director of the Division of Taxation in the promulgation of ratios for the purpose of distributing State school aid under the provisions of R.S. 54:1-35.1, et seq. For a proper understanding of the issues with which we are confronted, it is appropriate at this point to review the Director's procedure in this regard. The Director's objective under the statute is to determine among other things "the average ratio of assessed to true value of (such) real estate in the taxing district * * *." (R.S. 54:1-35.2). To do this, all locally assessed real estate in the taxing district is divided into four classifications (1) vacant land, (2) residential property of four units or less, (3) farmland, and (4) all other real estate not properly includible in the first three classifications. All usable sales involved in the sales study are likewise divided into the same four classifications and a ratio is determined for each classification by dividing the total amount of dollar sales for each class into the total assessments for the properties thus sold. This ratio in turn is used to project the assessments in each class to 100% and the result is the equalized value of all property in each classification. When ant testimony to establish excessive assessment or illegal discrimination will justly rest in the railroads for in this respect the situation does not differ from the ordinary appealing taxpayer who carries a similar burden.''

A considerable portion of the proofs offered by Pennsylvania in the present discrimination case consisted of voluminous exhibits which manifestly required detailed and painstaking research upon the part of the experts and assistants participating in their preparation. Illustrative of the nature and extent of the factual data thus presented are Exhibits PRR A-1 to A-5, identified and explained by William A. Stewart, a real estate expert of long standing. These documents collectively summarize a study of 16,602 real estate sales in Jersey City between July 1, 1946 and December 31, 1955 which, when added to a supplemental list of 299 other sales shown on Exhibit PRR A-21, indicate a total of 16,901 sales studied.

The foregoing studies made no attempts to separate for analysis different classifications for the properties involved but rather indiscriminately grouped all types. Broken down upon this basis, these exhibits show that between July 1, 1946 and June 30, 1947, 2,402 transactions took place. By aggregating the dollar volume of the sales involved and dividing such sum into the total amount of assessments in effect at the time of sale the result produces a weighted average ratio of 73.4 per cent between assessments and sales prices. By the same process the study reveals: from July 1, 1947 to June 30, 1948, 2,061 sales at a ratio of 75.3 per cent; from July 1, 1948 to June 30, 1949, 1,798 sales at a ratio of 70.6 per cent; from July 1, 1949 to June 30, 1950, 1,505 sales at a ratio of 72.2 per cent; from July 1, 1950 to June 30, 1951, 1,817 sales at a ratio of 66.8 per cent; from July 1, 1951 to June 30, 1952, 1,641 sales at a ratio of 65.5 per cent; from July 1, this procedure is repeated for each of the four classes, the sum of the equalized valuations for all categories is the "equalized valuation" of all locally assessed real estate in the taxing district. By dividing the "equalized valuation" into the total of all locally assessed real estate, the result is the average district ratio of assessed to true value for the taxing district under review.

Using the methodology thus employed by the Director in promulgating ratios for the distribution of State school aid, Mr. Stewart determined the applicable ratios to be as follows: July 1, 1946 to June 30, 1947, 76.64 per cent; July 1, 1947 to June 30, 1948, 76.23 per cent; July 1, 1948 to June 30, 1949, 69.21 per cent; July 1, 1949 to June 30, 1950, 69.93 per cent; July 1, 1950 to June 30, 1951, 65.67 per cent; July 1, 1951 to June 30, 1952, 63.29 per cent; July 1, 1952 to June 30, 1953, 60.01 per cent; July 1, 1953 to June 30, 1954, 60.97 per cent; July 1, 1954 to June 30, 1955, 57.53 per cent, and July 1, 1955 to December 31, 1955, 57.39 per cent. It may be noted at this point that for the period from July 1, 1954 to June 30, 1955, the Director in his school aid study, determined Jersey City's average ratio to be 62.61 per cent while from July 1, 1955 to June 30, 1956, 64.26 per cent, which ratios are somewhat higher than those found for the same period in the Stewart study.

Two other exhibits prepared by Mr. Stewart (PRR A-8 and A-10) purport to show real estate transfers made by railroads to the City of Jersey City and others between 1938 and 1955, of which 36 transfers were to Jersey City and 99 to others. No ratio analysis of the sales to Jersey City were made by Mr. Stewart, because most of the sales were for the nominal consideration of a dollar, but with respect to the 99 transfers to non-municipal grantees, it is indicated that of a total volume of sales aggregating $3,842,217, the assessments in force at the time of sale aggregated $9,360,381, or a ratio of assessments to sales of 243.6 per cent. The same exhibits show that if all sales were analyzed, the total consideration would be $3,932,814 against total assessments of $29,196,993, or a ratio of 742.4 per cent. Admittedly, part of the property included was assessed as second class railroad property at the time of sale.

Another average ratio study by Mr. Stewart purports to show for the years 1946 through 1955 the relationship between assessments and sale prices of garage, warehouse and industrial properties in the City of Jersey City (PRR A-11). In the course of the trial, it was developed that this exhibit contained numerous errors, as a result of which Mr. Stewart prepared a subsequent exhibit (PRR A-20 of the same order showing the average ratios for the same period which developed after the corrections were made. According to Mr. Stewart, for the year 1946 the average ratio of assessments to sales prices for properties in this category was 54.33 per cent; for 1947, 63.04 per cent; for 1948, 63.74 per cent; for 1949, 54.03 per cent; for 1950, 91.51 per cent; for 1951, 50.64 per cent; for 1952, 51.10 per cent; for 1953, 58.30 per cent; for 1954, 71.70 per cent and for 1955, 70.18 per cent. As in the preparation of his previous average ratio studies, Mr. Stewart's ratios were obtained in PRR A-11 and PRR A-20 by dividing the summation of sales prices into the summation of assessments in effect at the time of sale.

Other exhibits submitted by Pennsylvania upon the question of discrimination included an explanation by the Director of the Division of Taxation as to the method by which average ratios are determined for the purpose of distributing State school aid (PRR A-15), copies of the sales relied upon by the Director in promulgating State school aid average ratios for Jersey City on October 1, 1955 and October 1, 1956 (PRR A-16, 17), a copy of Form SR 1-A issued by the local property tax bureau to county tax boards and assessors for the reporting of sales information with respect to each transaction (PRR A-18), and a list promulgated and distributed by the Director showing 26 reasons why certain transfers of real estate should be considered non-usable for the purposes of State school aid average ratio studies (PRR A-19).

Another witness offered by Pennsylvania in aid of its allegations of discrimination was Stanley S. Schor, an assistant professor of statistics at the University of Pennsylvania. Professor Schor is an expert on statistical methodology and there is ample evidence of his qualifications and experience as a statistical consultant.

Based upon Mr. Stewart's average ratio studies of all Jersey City sales between 1946 and 1955 (PRR A-1 to PRR A-5) Professor Schor prepared a series of 40 separate exhibits, technically characterized by him as "histograms," which were admitted in evidence (PRR A-25 to PRR A-44; PRR A-49 to PRR A-68). In addition, there were likewise admitted into evidence four other exhibits prepared by Professor Schor based upon sales ratio studies made by the Director of the Division of Taxation in connection with the distribution of State school aid (PRR A-45-48).

Each of the first two histograms in evidence is founded upon the Stewart sales studies and both pertain exclusively to the year 1947. The first (PRR A-25) is an analysis of ratios of assessments to sales price based upon what may be loosely termed as the "unweighted" approach in the sense that the ratios are influenced by the number of sales involved in the study as distinguished from the dollar value of such sales. On the other hand, the second exhibit (PRR A-26) is based upon a study of the same sales but the ratios are influenced by the dollar volume of sales, rather than by the number of separate transactions, and this in turn has been characterized as the "weighted" approach. For the purposes of reference to the two methods, these terms hereafter will be used. Each of the two exhibits is a bar chart, showing in the case of unweighted analysis (PRR A-25) the number of sales on the vertical scale and on the horizontal scale the ratio of assessments to sales price. In the weighted analysis (PRR A-26) the horizontal scale shows the ratio of assessments to sales price but the vertical scale, instead of showing the number of sales, indicates the aggregate of the dollar value.

From the frequency distribution shown on each of these two exhibits, Professor Schor has developed separate ratios for the arithmetic mean, the median and the mode, all of which are measures of central tendency. In the unweighted approach (PRR A-25) the arithmetic mean is the average obtained by dividing the number of sales into the sum of all the ratios involved in the particular study. The median "is nothing more than the value which separate the distribution into two equal groups when the items are arrayed by order of magnitude." The mode "can be loosely called the value which more items have than any other particular value" or "the ratios of assessment to sales price which more properties would have than any other single ratio."

Analyzing these studies of central tendency, Professor Schor's first exhibit for the year 1947 produces by the unweighted approach an arithmetic mean ratio of 76 per cent, a median of 72 per cent and a mode of 69 per cent, while the weighted approach for the same year indicates an arithmetic mean of 73 per cent, a median of 69 per cent and a mode of 59 per cent. By the same process and methodology, Professor Schor has developed an indicated arithmetic mean, median and mode for each of the subsequent years from 1948 through 1955 (PRR A-27 through PRR A-42). A summary study for the years 1951 to 1954, inclusive (PRR A-43) based upon the Stewart sales studies, was likewise prepared by Professor Schor by the unweighted approach, and the result establishes an arithmetic mean of 58 per cent, a median of 53 per cent and a mode of 44 per cent. For the same period by the weighted approach (PRR A-44), the result is an arithmetic mean of 57 per cent, a median of 52 per cent and a mode of 43 per cent.

Twenty other histograms prepared by Professor Schor (PRR A-49 through PRR A-68) also analyzed the periods from 1948 through 1955, together with separate exhibits for the summary period from 1951 through 1954, both upon the weighted and unweighted approaches, but because of the author's time limitations, these studies were limited to the median and the mode. In all other respects this group of exhibits duplicated Professor Schor's histograms for the same period already adverted to except that dotted lines at the top of the vertical bars portray changes resulting from Mr. Stewart's corrections and supplements to exhibits PRR A-1 to PRR A-5 (PRR A-21).

The first statutory ratios were promulgated by the Director of the Division of Taxation by his own sales studies for the purpose of distribution of State school aid on October 1, 1955 and covered the fiscal year from July 1, 1954 to June 30, 1955. The following table was promulgated on October 1, 1956 for the period of July 1, 1955 to June 30, 1956. Each of the Director's studies for these years having been admitted in evidence, Professor Schor prepared a histogram for 1955 (PRR A-45) similar to those which were based upon the Stewart studies with the exception that the arithmetic mean was eliminated as a measure of central tendency likewise because of time limitations.

He thus established for that period a median of 51 per cent and a mode of 41 per cent and by the weighted approach for the same year (PRR A-46) his result showed a median of 57 per cent and a mode of 41 per cent. For the year 1956, the histograms predicated upon the Director's studies (PRR A-47) produced by the unweighted approach a median of 47 per cent and a mode of 38 per cent while the weighted approach for the same period (PRR A-48) contrasted a median of 59 per cent and a mode of 68 per cent.

In concluding its case on land discrimination, Pennsylvania called as its last witness Leo Rosenblum, Executive Assistant to the Director of Revenue and Finance of Jersey City, who in turn is the Assessor. Among his duties, Mr. Rosenblum supervises the Bureau of Tax Assessments of Jersey City and recommends all real and personal property assessments to the Assessor who generally accepts such recommendations by signing the assessment rolls in his capacity as Assessor. Mr. Rosenblum testified generally as to assessment history, procedures and practices in Jersey City which will be reviewed in greater detail elsewhere in this opinion.

As hereinbefore indicated, we are mindful of and have taken into consideration upon the disposition of this motion certain discrimination proofs submitted by Pennsylvania in the structure case. In large measure those proofs were concerned with assessment practices and procedures in the City of Jersey City bearing marked similarity to the subsequent testimony of the same nature by Mr. Rosenblum. It should be noted that in the earlier proceeding, Pennsylvania also called as its witness, Mr. Donald Spence, Tax Assessor and Director of Revenue and Finance of the City of Jersey City. Mr. Spence was unable to contribute very much toward a solution of the discrimination issue, he having relied upon Mr. Rosenblum's recommendations with respect to assessments and assessment practices. Other witnesses called by Pennsylvania in the structure case produced records of various building permits issued by the City of Jersey City and of building contracts filed in the office of the Hudson County Register pertaining to proposed new construction in Jersey City, but little or no effort was made to relate such information to the legal requirements of the discrimination case as enunciated by decisional law.

In substance, we have recounted an outline of all of the testimony offered by Pennsylvania in support of its claim that it has been discriminated against with respect to assessments upon its Class II railroad property. It requires no citation of authorities to establish that for the purposes of this motion Jersey City admits the truth of all material evidence and all facts reasonably inferable therefrom. Whether these facts and inferences support a claim of legal discrimination is the sole and vital issue with which we are now concerned, and guided by the foregoing judicial principles, we turn to an examination of Pennsylvania's proofs to determine whether it has discharged in the legal sense the burden imposed upon it.

Mr. Stewart's exhibits have received our careful attention in relation to the discrimination issue. His basic exhibits (PRR A-1 to PRR A-27) upon which the major thrust of the discrimination claim is premised obviously are a study of average ratios of assessments to sales prices in Jersey City between 1946 and 1955, for his testimony frankly concedes that his ratios were determined by dividing the sum of all sales prices into the sum of assessments in effect at the time of sale, without regard to the classification or type of property involved. The sales involved in this study run the gamut of a tremendously wide range of ratios and the pattern of the study in almost all years discloses sales with individual ratios as low as 10 per cent on one side of the scale and as high as 200 and 300 per cent on the other side. The ratios shown on these exhibits are "average" assessment ratios which in *D. L. & W.* v. *Neeld, supra,* the Supreme Court condemned as inadequate proof when used alone in discrimination cases; and they fail to bear any resemblance to the common ratio or common standard of valuation required to be shown. Unsupported by other proofs these ratio studies fail to support a claim of legal discrimination.

Likewise, the Director's tables of equalized valuations for 1955 and 1956 fall short of the mark for they do not differ in any respect from the tables which were specifically rejected by the Supreme Court in *D. L. & W.* We are mindful that in another exhibit (PRR A-7) Mr. Stewart attempted to relate these sales to the classifications used by the Director in the promulgation of his State school ratios but the end result of this project, assuming its arithmetic correctness, is to produce ratios of the same nature and purpose as those contained in the school aid table. As we view it, the sum total of all this endeavor negates rather than proves a common level of assessments in Jersey City. The basic information contained in these studies makes it impossible to conclude that a common level or ratio exists.

Mr. Stewart's other exhibits were considered to be informative but of little help upon the precise question at hand. His studies of real estate transfers from railroads to Jersey City and others between 1938 and 1955 (PRR A-8 and PRR A-10) show 36 transfers to Jersey City and 99 to others during said period; upon their face these are inadequate even remotely to establish a common level, and it is worthy of comment that many of these railroad sales could not stand the close scrutiny required when tested by the 26 reasons which the Director himself has assigned for the rejection of sales as unusable in ratio sales studies. As to Mr. Stewart's further study which purports to show the relationship between assessment and sales prices of garage, warehouse and industrial properties in Jersey City between 1946 and 1955 (PRR A-11) we are constrained to the same view that the study is one of average ratios and insufficient when offered as sole support for a claim discrimination.

As we have already shown in *North Bergen Township* v. *Venino, supra,* average ratios tables are admissible in evidence, and in company with "other competent evidence of unequal treatment of a property owner, they may bring the sum total of the proof to the probative force necessary to demonstrate discrimination." In an attempt to link up the average ratio studies with common level, Pennsylvania called Professor Schor whose exhibits have already been explained in some detail. We are required to determine whether Professor Schor's "histograms," considered with Mr. Stewart's exhibits, serve to prove a common level of assessments even though the sales studies standing alone manifestly fail to do so.

Professor Schor was quite candid in conceding that for all years involved in his study the statistical evidence assembled establishes that "a common ratio for these years was not aimed at." He testified further that insofar as the study of sales shown on his histograms is concerned "there is obviously no evidence of intention upon the part of the assessor to assess at a common level." Professor Schor theorizes that if a "common ratio" means that all of the properties in the taxing district have the same ratio, "Obviously, there is not a common ratio." He says further that if "common" is defined as "the ratio which more properties have than any other single ratio, the mode then is the common ratio." At another point in his testimony, Professor Schor said that "common" means "a representative value." When asked whether this in itself did not imply an average value, he responded "one of the averages." A "representative value" in turn was defined by the witness as "a value around which the items tend to cluster. It is the most typical value in the distribution."

The only conclusion logically to be drawn from Professor Schor's testimony is that he finds no evidence of a common ratio, as judicially defined, for in *D. L. & W.* v. *Neeld, supra* Mr. Justice Heher stated that the "common" ratio imports general equality in the incidence of the tax, the equality of the burden that is of the essence of constitution uniformity * * *." In the same opinion it was shown that the "average" ratio "is the arithmetical mean or median of varying ratios of true value, necessarily making for unequal proportions of value * * *." In *North Bergen Township* v. *Venino, supra,* Mr. Justice Francis concludes that a "common ratio signifies that the *same standard or percentage of value is used in assessing each property in the district.*" It is of little avail for Professor Schor to say that his modal values show a "most common ratio," for manifestly if the existence of a common level is to be determined it must be in accordance with judicial standards rather than by the strained and abortive definition of a statistical consultant.

By reducing Professor Schor's histograms and statistical language to utter simplicity, we find that he has analyzed a study of sales in Jersey City over a long period of time. Through graphs showing intervals at five percentage points, he thereby indicated how many sales by the unweighted approach and how many dollars of sales by the weighted approach were involved in each interval. As is inevitable in a study of this nature, more sales appear in certain intervals than in others, which is to say that where the averages are made up of ratios deviating more than 200 per cent, only by an unusual coincidence could it develop that each interval produced precisely the same number of sales. A random examination of any of Professor Schnor's numerous exhibits will serve to emphasize these observations for they make it patent that assessments in Jersey City during the years in question were not at a common ratio or level.

The classic example of a taxing district assessed at a common level is found where a complete revalution has been effected. In such a situation the true value of each and every property is first determined by appraisals, after which the assessor usually adopts a ratio to be applied uniformly as against the true value of each parcel. The accuracy of the appraisals is always subject to human frailties and the total accomplishment should therefore be expected to fall short of perfection, but the intention of the assessor to assess all real estate in the district at a common level or the same ratio is beyond challenge.

Thus, while in a revalued taxing district, true value becomes an issue to be debated by real estate experts and ultimately determined by the administrative or judicial officer having the decisional power, for purposes of a discrimination case the common level is not in dispute because of the undeniable policy of the assessor to assess at a proclaimed ratio. The important distinction between the case of a revalued district and the situation in Jersey City not only arises because there has been no such revalution in Jersey City but also by virtue of the fact that Pennsylvania's sales stud as interpreted by Professor Schor, discloses beyond contradiction a wide disparity in ratios of assessment to selling price in each of the years involved. These factors negate rather than support the existence of a common level of assessments in Jersey City.

Statistical studies undoubtedly serve a valuable function in our economic life and their use in an appropriate situation is not to be disparaged. Pennsylvania's insistence that Professor Schor's modal ratios represent the common level of assessments in Jersey City is without substance. To assert that merely because more sales occur in one class interval than all others a common level is thereby established is to ignore reality as well as to reject the clear import of our decisional law. When President Labrecque asked Professor Schor what the result would be if a modal study developed 100 sales at 50 per cent, 100 sales at 60 per cent and 100 sales at 70 per cent, the answer was "Then there is no common ratio. * * * Your premise negates the possibility of having a mode." It is readily apparent that if no common level can be established from these assumed facts, a common level which allegedly results by shifting a few sales from one class interval to another raises grave doubt as to accuracy and usability.

*It follows from all that has been said that a common level as defined by our courts probably does not exist in many of our taxing districts.* Failure to conduct an appropriate revaluation program over a long period of time coupled with disparities that naturally result from the influence of the market place and economic forces affecting different types of real estate in varying degrees all serve to create new and to compound existing inequities in the assessment structure. In the instant case, even though we find that locally assessed properties were assessed at less than true value, we can reduce only to the common level or standard of valuation.

Thus Judge Conford held in *Jat Company, Inc.* v. *Division of Tax Appeals, supra,* that two requirements must be satisfied to support a discrimination charge. One is a showing that the assessing authorities are applying a common standard of valuation. *We find that such a showing has not been made out under the proofs before us.* We cannot reasonably infer that a common level exists. This renders it unnecessary to determine whether the second requirement set out by him has been met.

We concede that as is the situation in many municipalities the present assessments in Jersey City leave much to be desired from the viewpoint of uniformity and statutory and constitutional equality. We however cannot assume that the present unequal state of the assessment rolls in Jersey City is due to the systematic or intentional design of the assessing authorities; rather it appears that the present status reflects the failure to revalue for a period estimated to be as much as thirty years. The factual background in Jersey City is not dissimilar from that which required judicial action in *Switz* v. *Middletown Township*, 23 N.J. 580 (1957). There the ratio range also showed a great disparity not only between various classes of taxpayers but between taxpayers of the same class as well. In order to compel the establishment of a common level in that taxing district, the Supreme Court mandated the local assessor to revalue at 100 per cent of true value all assessable real estate. We observe parenthetically that a common level could be achieved at any ratio, for equality of tax burden rather than a specific ratio is the broad objective.

In a concurring opinion, Chief Justice Weintraub made certain observations which are peculiarly appropriate to the subject case (p. 603):

> "With respect to 'discrimination' the record as it stands would support at most a finding that plaintiff, to an extent not revealed, fared more poorly than

> some other property owners and perhaps did better than others, and not because of any invidious design as to her, but essentially because the assessment rolls got out of hand. This situation is not peculiar to Middletown Township, but rather is typical, as the Director's tables show, of the situation in other municipalities. The reason is free of intentional wrong."

While the facts of Middletown were insufficient to sustain a claim for immediate relief under a claim of discrimination, ultimate relief for all of the taxpayers of the district was assured by the Supreme Court's mandate. Thus, this landmark decision gives rise to judical relief whenever poor assessment practices or other reasons indicate the absence of a common level of assessments.

New Jersey has become alive to the problems of tax discrimination only in recent years. Our decisional law has now progressed to the point where taxpayers are assured of relief from discrimination where the proofs rise to the level of judicial requirements. Such relief was in fact granted in *Baldwin Const. Co. v. Essex County Bd. of Taxation*, 16 N. J. 329 (1954) where it was shown that real estate had been assessed by local assessors according to a common ratio of value but increases in assessments had been selectively and arbitrarily imposed. But the evidence before us shows no such circumstances. Rather, there is testimony to the contrary. When Mr. Rosenblum testified concerning assessment practices in Jersey City, he recounted the assessment history of the Jersey City Hudson River waterfront from 1942, when he was then President of the Hudson County Board of Taxation, to the present time. Mr. Rosenblum says that in 1942 "we found some very glaring instances of inequalities in land assessments, which would have required correction even in the absence or short of a complete revaluation of land." As an instance of such inequalities, Mr. Rosenblum testified that in 1942 railroad and other waterfront taxpayers "were assessed on a much higher basis by the City of Jersey City than the same railroads were assessed by the State Tax Commissioner" (now Director). Mr. Rosenblum declared that to cure this condition "We did reduce the railroad owned lands which were assessed locally, so that they more reasonably conformed in assessments to the assessments on contiguous and comparable lands that had been made by the State Tax Commissioner. And we did that throughout the City. Wherever we found the need for it, we did the same thing." Manifestly, at least in this instance, some affirmative effort was made to relieve from obvious discrimination, although at that time second class railroad assessments were favored as against local assessments on railroad owned property on the waterfront.

Viewed in its most favorable light, we find that the evidence as a whole provides no basis for a claim of discrimination in the legally significant sense. It is therefore our considered opinion that so much of the Pennsylvania complaints as allege discrimination should be dismissed for the limited purpose of eliminating therefrom the single issue of discrimination as distinguished from the remaining question of true value. It follows that the land valuation trial now in progress shall continue until concluded.

## Dissenting Opinion of Division of Tax Appeals

Kopp, Commissioner, dissenting. I am reluctantly obliged to dissent for the following reasons:

If the opinion of the majority is a correct interpretation of the law, i. e. that the common level of assessment to true value cannot under any circumstances be determined by averaging several ratios of assessment to true value, then the law has placed a premium on disparity of assessment. An assessor may, therefore, prevent a taxpayer from obtaining relief from an assessment which places a greater burden of taxation upon him than many other taxpayers in the same taxing district merely by being certain to have more than one level of assessment, no matter how slight the variance between them.

For example—assume a taxing district having only five taxable parcels of real property—two parcels are assessed at 10% of true value, two parcels are assessed at 50% of true value and one parcel is assessed at 100% of true value. It is obvious that there is either no common level of assessment or the common level of assessment is an average of all five parcels. If we accept the interpretation of the majority that the common level can never be reached by averaging ratios, or using the median or modal approach, then there is no common level and the taxpayers who are assessed at 100% and 50% of true value quite obviously bear an unfair burden of taxation and yet before the Division of Tax Appeals they are without remedy or relief. By this result we have neither adherence to the statutory requirement of assessment at true value nor that uniformity and equality of assessment which is said to be the just and ultimate purpose of the law.

In this case it is admitted that the property of the Railroad is assessed at 100% of true value and that a great percentage of the other taxpayers in Jersey City are paying taxes based on a much lower ratio of assessment to true value. That this, per se, constitutes discrimination against the Railroad seems to be crystal clear. If this Division cannot grant relief, and it cannot under the majority's interpretation of the law, then, to whom does this taxpayer turn for aid in obtaining equal treatment under the law?

I recognize that the opinion in *Jat Company, Inc.* v. *Division of Tax Appeals,* 47 N. J. Super. 571 (App. Div. 1957) leads to the interpretation of the law which the majority here has placed upon it, but I cannot, in the absence of a specific decision by the Supreme Court of New Jersey, bring myself to believe that such is the status of the law in this State, in view of the fact that such an interpretation not only permits but actually encourages assessors to assess real property owners unequally.

The Supreme Court of Pennsylvania in the case of *In Re Brooks Building,* 137 Atlantic 2nd 273 (Sup. Ct. 1958) reversed a lower court with these very pertinent statements: After quoting from the decision of the lower court as follows:

> "The appellant is certainly entitled to relief but we regret exceedingly that we cannot be of help."

The court goes on to say: (The underlining is the Courts)

> "The reason the Court below concluded it could not help was because it believed that the Superior Court decided that the burden was upon the taxpayer to prove that a *fixed* ratio of assessed value to actual value was applied *generally* throughout the district, and in the absence of such proof actual value is conclusive. In other words, if an assessor, without actual fraud, negligently, foolishly or capriciously assessed some properties at 10% of actual value, other similar properties at 20%, other similar properties at 50%, others at 75% and plaintiff's at 90%, it would be unjust and ridiculous to hold that since there was no fixed ratio of assessed value to actual value *generally* throughout the district, plaintiff failed to prove a lack

> or violation of uniformity which the Constitution requires."

The Court said further at page 276:

> "* * * The City's contention that appellant's assessment cannot be changed and reduced unless he proves that a *uniform* ratio of assessed value to actual value has been applied generally throughout the entire district is likewise erroneous."

The Court then reversed the lower court and remanded the case to it to make an assessment consistent with the opinion.

The soundness of the reasoning in *In Re Brooks Building* (*supra*) coupled with the obvious injustice resulting from the determination of the majority here compels me to believe that the Supreme Court of New Jersey will not follow the *Jat* case (*supra*) especially since the remarks concerning discrimination in that opinion were not necessary to the decision thereof. Insofar as *North Bergen Township* v. *Venino*, 45 N. J. Super. 143, (App. Div. 1957) is concerned, I interpret that decision differently than the majority in that I believe it simply holds that merely showing that a general average ratio of assessment to true value exists in the municipality does not in itself, without anything more, prove the fact of discrimination and that since no discrimination was proven, no relief could be had. The case does not clearly stand for the proposition that having proven the fact of discrimination, the average ratios cannot be used to determine the amount of discrimination. (See Rutgers Law Review, Volume XII, Number 1, Note 76, Pages 64 & 65).

In view of the foregoing, I would deny the motion and upon completion of the proofs on the question of the true value of the subject properties determine the true value of said properties to which I would apply that ratio of assessment to true value which, after consideration and thorough weighing of all of the testimony and exhibits pertaining thereto, appeared to be the most common level, without endeavoring to reach a common level which was mathematically accurate. Of course, what constitutes the common level in a municipality on any assessment date is a matter of fact to be proven by competent evidence. Some evidence of the common level, but certainly not conclusive thereof, it sees to me, are the ratios found in the existing Tables of Equalization and in the absence of other or better proof of the common level, that ratio found in existing tables which is most pertinent should be applied, unless from the proofs the application of such ratio would appear to work injustice. Exactly what ratio should be applied here should, therefore, be determined upon completion of all testimony on all phases of the case.

Commissioner Duffy concurs in this opinion.

# Appendix M

## New Jersey Constitution, Article VIII, Section I, Paragraph 1

1. Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value; and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district.

# Appendix N

## Excerpts from Railroad Tax Law of New Jersey (54:29A-)

* * *

### 54:29A-6. GENERAL POWERS OF COMMISSIONER

The commissioner is hereby authorized and empowered to carry into effect the provisions of this act and subject thereto he shall prescribe and publish all needful rules and regulations for its enforcement. He shall keep a record of his proceedings and shall report annually to the Legislature. L. 1941, c. 291, p. 775, §6.

### ARTICLE 2. PROPERTY TAX

### 54:29A-7. PROPERTY TAXABLE; RATE

There is hereby levied an annual property tax upon all property used for railroad purposes which shall be assessed by the commissioner, in the manner and at the rates hereinafter provided, for the year one thousand nine hundred and forty-eight and for each year thereafter. L. 1941, c. 291, p. 776, §7, as amended L. 1948, c. 40, p. 116, §4.

### 54:29A-8. LEASED PROPERTY

If the property of a railroad be leased to or operated by another corporation, foreign or domestic, the property of the lessor, or company whose property is operated, shall be subject to taxation in the manner provided in this act. L. 1941, c. 291, p. 776, §8.

### 54:29A-9. MOVABLE PROPERTY

Tangible personal property which is used or kept but a part of the time in this State by any railroad shall be assessed such proportionate part of its value as the time it is used or kept in this State during the calendar year preceding bears to the whole year. L. 1941, c. 291, p. 776, §9.

* * *

54:29A-11. Assessment in Lieu

Taxes assessed pursuant to this act shall be in lieu of all other State or local taxation of or measured by property taxable hereunder, other than assessments for benefits. L. 1941, c. 291, p. 777, §11.

* * *

### Article 4. Assessment and Disposition

54:29A-16. Local Assessors; Information Returns

The assessors in all taxing districts where property of a railroad not used for railroad purposes shall be assessed, if required so to do by the State Tax Commissioner, shall certify and send to the commissioner on or before the second Monday in June in each year, a statement giving the description of such property included in the local ratables for that year, and showing the assessed valuation thereof. They shall also, at the same time, certify and send to him a short description of all the real property in their respective taxing districts, used or owned for railroad purposes excepting the main stem or roadbed and track, not exceeding one hundred feet in width of each railroad. L. 1941, c. 291, p. 778, §16.

54:29A-17. Valuation; Notice

On or before November first in each year the commissioner shall determine the true value, as of the preceding January first, of all property used for railroad purposes in this State. There shall be excluded, however, property of a railroad which passed out of railroad ownership subsequent to January first and before October first and not used for railroad purposes on October first. The commissioner shall, in such determination, ascertain values according to the following classes:

I. The length and value of the main stem of each railroad, and the length of such main stem in each taxing district;

II. The value of the other real estate used for railroad purposes in each taxing district in this State, including the roadbed (other than main stem), tracks, buildings, water tanks, riparian rights, docks, wharves and piers, and all other real estate, except lands not used for railroad purposes;

III. The value of all the tangible personal property of each railroad.

Upon completion of his valuation of property used for railroad purposes, but not later than December tenth in each year, the commissioner shall deliver a detailed statement thereof, including the several classes of property, to each taxpayer; and not later than December fifteenth in each year the commissioner shall certify the value of Class II property in each taxing district to the assessors in the several taxing districts in which the property is situate and shall deliver to each taxing district which files with the commissioner a written request therefor, not later than the tenth day prior to the last day for completion of his valuation, a copy of so much of each detailed statement delivered to each taxpayer as covers Class II property located in such taxing district. L. 1941, c. 291, p. 779, §17, as amended L. 1942, c. 337, p. 1188, §1; L. 1948, c. 40, p. 118, §8; L. 1952, c. 229, p. 774, §1.

54:29A-18. HEARING; DETERMINATION; NOTICE

Any taxpayer or the Attorney-General on behalf of the State and of the taxing districts claiming that error has been made in the commissioner's valuations may, on or before the second Monday of January following the completion of such valuations, file a petition for review specifying the grounds of complaint and the relief sought. The petition shall be in such form and shall contain such further information as may from time to time be prescribed by the commissioner for the better understanding and determination of the complaint. The commissioner shall conduct a hearing upon such petition, shall review the valuations of which it complains, shall make his determination thereon and correct the same as shall appear just before the fifteenth day of March following the filing of the petition.

The commissioner shall, on or before said fifteenth day of March, certify to each county board of taxation in the several counties the value of Class II property, situate in each taxing district in the county, which certification shall contain such corrections as shall be made pursuant to this section. L. 1941, c. 291, p. 779, §18, as amended L. 1942, c. 337, p. 1189, §2; L. 1948, c. 40, p. 119, §9.

* * *

54:29A-19. ASSESSMENT; CLASS II PROPERTY TAX

(a) The value of Class II property certified by the commissioner to the respective county boards of taxation shall be included for all purposes in the total valuations taxable in the several taxing districts, and the county board of taxation of each county shall ascertain and certify to the commissioner on or before the first day of April in each year, following receipt from the commissioner of Class II property valuations, the general tax rate per hundred dollars of valuation to apply in that year in each taxing district in the county containing Class II property valuations.

(b) Upon receipt of the certificates from the county boards of taxation, the commissioner shall on or before the tenth day of April assess a tax to each taxpayer upon its Class II property valuations at the general tax rate in each taxing district so certified by the respective county boards of taxation. L. 1941, c. 291, p. 780, §19, as amended L. 1942, c. 337, p. 1190, §3; L. 1948, c. 40, p. 119, §10.

* * *

### 54:29A-21. TAX STATEMENTS

Within ten days after completion of his assessment of property tax, the commissioner shall serve upon each taxpayer a statement of the total amount of property tax payable and the assessed valuations of property by classes, as described in section seventeen of this act,[1] the latter arranged according to taxing districts and, in the case of system assessments, according to railroad ownership of the property and shall serve upon each taxing district, which files with the commissioner a written request therefor not later than the tenth day prior to the last day for completion of said assessment, a copy of so much of each statement served upon each taxpayer as covers Class II property located in such taxing district.

Within ten days after completion of his assessment of franchise tax, the commissioner shall serve upon each taxpayer a statement of the total amount of franchise tax payable and the manner of computation thereof.

The failure of any taxpayer to receive a statement of assessment as herein required shall not invalidate any such assessment or the lien thereof, nor shall it relieve the taxpayer of the obligation of payment of the assessment as required by this act. L. 1941, c. 291, p. 780, §21, as amended L. 1942, c. 337, p. 1190, §5.

### 54:29A-22. CERTIFICATION TO COMPTROLLER

Within fifteen days after completion of his assessments, the commissioner shall report and certify all assessments and the statements thereof to the State Comptroller. The several statements shall be recorded in books kept in the office of the State Comptroller, to be provided by him for that purpose, and shall be public records open to public inspection. L. 1941, c. 291, p. 780, §22.

54:29A-23. TAX FOR STATE USE

All receipts from taxation of property used for railroad purposes other than from assessments of Class II property, as described in section seventeen of this act,[1] together with the receipts from the franchise tax imposed hereunder shall be applied to the uses of the State according to law. L. 1941, c. 291, p. 781, §23, as amended L. 1948, c. 40, p. 122, §12.

54:29A-24. TAX FOR LOCAL USE

(a) The entire amount of tax receipts derived from the assessment of Class II property, as described in section seventeen of this act[1] shall be, by the State Comptroller, allotted to and paid over to the local taxing districts in which such property is situated. Each taxing district shall receive the total amount of tax derived from the assessment of second-class railroad property situated within the taxing district.

(b) The Comptroller shall transmit to each county treasurer a certificate showing the amounts allotted to the taxing districts therein, and shall, on or before December tenth of the year in which the taxes are payable, draw and transmit his warrant upon the State treasury, in favor of the several county treasurers, for the amounts allotted to their several counties. Each county treasurer shall forthwith, and not later than December fifteenth, pay to the collector or other proper officer of each taxing district the amount allotted thereto, deducting, however, the amount due for county taxes from the taxing district. The amount thus paid to the county and taxing district shall be at the disposal of the proper authorities for public purposes. L. 1941, c. 291, p. 781, §24, as amended L. 1948, c. 40, p. 122, §13.

* * *

## ARTICLE 6. APPEAL AND REVIEW

### 54:29A-31. APPEAL TO STATE BOARD OF TAX APPEALS

Any taxpayer, the Attorney-General on behalf of the State, or the authorities of a taxing district, desiring to contest the validity or amount of any assessment or reassessment of property or franchise tax made by the commissioner under this act, may, as to the assessment or reassessment of property tax, on or before the third Monday of May following the assessment or reassessment thereof, and, as to the assessment or reassessment of franchise tax, on or before the first Tuesday of September following the assessment or reassessment thereof, file a written complaint with the State Board of Tax Apeals, specifying the grounds of complaint and the relief sought, which shall be in such form and contain such further information as may be from time to time prescribed by the rules of the State Board of Tax Appeals for the better understanding and determination of the complaint. L. 1941, c. 291, p. 784, §31, as amended L. 1942, c. 337, p. 1191, §6.

### 54:29A-32. COMPLAINT AND NOTICE

If the complaint is made by a taxpayer, a copy of the complaint and notice of application for hearing thereon shall be served upon the Attorney-General five days before the filing of the complaint by leaving a copy of the complaint and notice at his office, and in respect to second-class property in any taxing district, a copy of the complaint and notice of application for hearing thereon shall be served upon the clerk of such taxing district, by leaving a copy of the complaint and notice at his office. If the complaint is made by the Attorney-General or any taxing district, a copy of the complaint and notice of application for hearing thereon shall be served upon the taxpayer five days before the filing of the complaint by leaving a copy of such complaint and notice at its principal office in this State. L. 1941, c. 291, p. 784, §32.

54:29A-33. HEARING UPON COMPLAINT

The State Board of Tax Appeals shall meet on the third Monday of May in each year at the State House, Trenton, for the purpose of fixing a time and place for the hearing of any complaint as to the validity or amount of any assessment or reassessment of property tax filed under section thirty-one of this act.[1]

The State Board of Tax Appeals shall meet on the first Tuesday of September in each year at the State House, Trenton, for the purpose of fixing a time and place for the hearing of any complaint as to the validity or amount of any assessment or reassessment of franchise tax filed under section thirty one of this act.[1]

The Attorney-General shall appear on behalf of the State before the State Board of Tax Appeals in person or by such deputy as he may appoint and designate for that purpose. If it shall be made to appear upon such hearing that any such assessment or tax is illegal, excessive, insufficient or that there has been illegal discrimination in the assessment, the board shall correct, adjust and equalize such assessment or tax. L. 1941, c. 291, p. 784, §33, as amended L. 1942, c. 337, p. 1192, §7.

## *Appendix N*

### Taxation

### 54:29A-34. Conclusion of Hearings

The State Board of Tax Appeals shall conclude its hearings on all complaints provided for by section thirty-one of this act[1] on or before the first day of November following the filing of the complaints and between November fifth and November tenth following shall certify to the State Tax Commissioner its final determination. L. 1941, c. 291, p. 785, §34, as amended L. 1942, c. 337, p. 1192, §8.

### 54:29A-35. Certification

Whenever a final determination of the State Board of Tax Appeals, as certified to the commissioner, corrects, modifies, or otherwise affects the amount of classification of any assessment of property taxes or amends any assessment of franchise tax made by the commissioner, he shall forthwith certify to the Comptroller all changes and corrections necessary to conform the assessment of tax to the determination of the board of tax appeals. L. 1941, c. 291, p. 785, §35.

### 54:29A-36. Judicial Review

If a taxpayer, or the Attorney-General on behalf of the State, or the authorities of any taxing district shall desire to contest the final determination of the division of tax appeals, such contest shall be made by a proceeding in lieu of prerogative writ. L. 1941, c. 291, p. 785, §36, as amended L. 1953, c. 51, p. 918, §124.

### 54:29A-37. Scope of Review

If it shall be made to appear before the Superior Court in a proceeding in lieu of prerogative writ that the final determination of the division of tax appeals in respect to any such assessment or tax in controversy is illegal, excessive, insufficient, or that there has been illegal discrimination in the assessment, the court shall correct, adjust and equalize such assessment and tax or refer same back to the director of the division, who shall correct, adjust and equalize the assessment and tax in accordance with the instructions or decision of the court. L. 1941, c. 291, p. 785, §37, as amended L. 1953, c. 51, p. 918, §125.

### 54:29A-38. PAYMENT PENDING LITIGATION

If a proceeding in lieu of prerogative writ is brought by a taxpayer, such taxpayer shall pay to the State Treasurer, as a condition for prosecuting the proceeding, the amount of the taxes then not in substantial controversy. If the taxpayer and the Attorney-General or the authorities of the taxing district, as the case may be, are unable to agree on the amount of taxes then not in substantial controversy, such amount shall be determined by the Superior Court. Upon the payment of the amount of taxes then not in substantial controversy, the payment or collection of the remainder of the taxes shall be stayed until the final determination by the Superior Court on the proceeding in lieu of prerogative writ, notwithstanding any law to the contrary. L. 1941, c. 291, p. 786, §38, as amended L. 1953, c. 51, p. 919, §126.

### 54:29A-49. PAYMENT PENDING LITIGATION; CREDITS

Any taxpayer may pay the amount of an assessment into the State treasury, notwithstanding litigation may be pending as to the validity of the whole or any part of said tax, and if it shall be determined in any litigation that the whole or any part of the tax so paid has been unlawfully assessed or imposed, the State Treasurer shall give credit for such overpayment to the taxpayer so paying, upon the taxes next legally levied and payable into the State treasury subsequent to the determination of any such litigation. L. 1941, c. 291, p. 790, §49.

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### 54:29A-53. INTEREST

Taxes heretofore imposed pursuant to any law for the taxation of property used for railroad and canal purposes or hereafter imposed pursuant to this act, or any unpaid portion thereof, shall bear interest from and after the date upon which they became or may become due and delinquent at the rate of one per centum (%) for each month until paid, notwithstanding the prosecution of any action or proceeding, including a proceeding in lieu of prerogative writ. L. 1941, c. 291, p. 791, §53, as amended L. 1953, c. 51, p. 921, §132.

## ARTICLE 8. COLLECTION

### 54:29A-54. LIEN OF TAXES

The taxes imposed by this act or heretofore imposed pursuant to any act for the taxation of property used for railroad and canal purposes shall be and remain a lien paramount to all other liens upon the revenues and all the real and personal property owned, used or controlled by the taxpayer within this State. The lien shall take effect as of the first day of the year in which the tax is payable. L. 1941, c. 291, p. 791, §54.

### 54:29A-55. TAX A DEBT; PREFERENCE

The taxes imposed by this act or heretofore imposed shall be and remain a debt due from the taxpayer to the State for which an action may be maintained, and shall be a preferred debt in case of insolvency. L. 1941, c. 291, p. 791, §55, as amended L. 1953, c. 51, p. 922, §133.

# Appendix O

## Excerpts from Railroad Tax Law of New Jersey (54:4-)

### ARTICLE 1. PERSONS AND PROPERTY SUBJECT TO TAXATION

### 54:4-1. PROPERTY SUBJECT TO TAX; INTANGIBLE PERSONAL PROPERTY EXCLUDED; OMITTED PROPERTY; DATE OF ASSESSMENT

All property real and personal within the jurisdiction of this State not expressly exempted from taxation or expressly excluded from the operation of this chapter shall be subject to taxation annually under this chapter at its true value, and shall be valued by the assessors of the respective taxing districts. An executory contract for the sale of land, under which the vendee is entitled to or does take possession thereof, shall be deemed, for the purpose of this act, a mortgage of said land for the unpaid balance of purchase price. Personal property taxable under this chapter shall include, however, only tangible goods and chattels and shall not include any intangible personal property whatsoever whether or not such personalty is evidenced by a tangible or intangible chose in action, except as otherwise required by sections 54:4-20, 54:4-21 and 54:4-22 hereof. Property omitted from any assessment may be assessed by the county board of taxation within such time and in such manner as shall be provided by law. All property shall be assessed to the owner thereof with reference to the amount owned on October first in each year, and the person so assessed for personal property shall be personally liable for the taxes thereon. As amended L. 1942, c. 281, p. 1095, §1; L. 1943, c. 120, p. 353, §1; L. 1945, c. 163, p. 576; §1; L. 1946, c. 159, p. 722, §1; L. 1946, c. 242, p. 857, §§1, 2; L. 1947, c. 413, p. 1287, §14.

* * *

## ARTICLE 5. ASSESSMENT OF REAL ESTATE

### 54:4-23. DUTY OF ASSESSOR; STANDARD OF VALUE

The assessor shall ascertain the names of the owners of all real property situate in his taxing district, and after examination and inquiry determine the full and fair value of each parcel of real property situate in the taxing district at such price as, in his judgment, it would sell for at a fair and bona fide sale by private contract on October first next preceding the date on which the assessor shall complete his assessments, as hereinafter required. As amended L. 1942, c. 281, p. 1096; §3; L. 1943, c. 120, p. 353, §3.

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IN THE

# Supreme Court of the United States

October Term, 1957

## No. 1010

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation of the State of New Jersey, THE PENNSYLVANIA RAILROAD COMPANY, a corporation of the Commonwealth of Pennsylvania; LEHIGH VALLEY RAILROAD COMPANY, a corporation of the Commonwealth of Pennsylvania; THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a corporation of the Commonwealth of Pennsylvania, and ERIE RAILROAD COMPANY, a corporation of the State of New York,

*Petitioners,*

*vs.*

AARON K. NEELD, Director, Division of Taxation in the Department of the Treasury, State of New Jersey, and CITY OF JERSEY CITY, CITY OF HOBOKEN, CITY OF CAMDEN, TOWN OF SECAUCUS, CITY OF NEWARK and TOWNSHIP OF WEEHAWKEN, all municipal corporations of the State of New Jersey,

*Respondents.*

# BRIEF FOR MUNICIPAL RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## Counter-Statement of Questions Presented

1. Does this court have jurisdiction to issue a writ of certiorari where no federal question was actually decided by the state court, or was necessary to the decision?

2. Does this court have jurisdiction to issue a writ of certiorari where the federal question presented in the petition for the writ, namely, the inadequacy of the state remedy by federal constitutional standards, was not raised before the state court but was presented in the petition for certiorari for the first time?

3. Where the court of highest authority in the state has specifically adopted and applied the rationale of the decisional law of the federal Supreme Court relating to unconstitutional discrimination of a tax assessment, will this court grant a writ of certiorari on the ground of the inadequacy of the state remedy?

## Counter-Statement of the Case

The petition seeks a writ of certiorari to review judgments of a state court. It is based upon the thesis that the state remedy is inadequate and therefore violative of the Fourteenth Amendment.

Petitioners make reference in detail to a variety of causes instituted previously to and concurrent with the matters which give rise to the present proceedings. For the purpose of identification only, we point out that none of the consolidated complaints leading to the judgments sought to be reviewed (hereinafter referred to as the "subject complaints") are annexed to the petition but appear in the Superior Court record below from pages 1a to 57a. On the other hand, a sample complaint in what the petitioners term a "companion case" (hereinafter referred to as the "companion complaint") ,not consolidated with the subject complaints, is annexed to the petition (App. F, p. 38a). The latter is not, strictly speaking, a "companion case" but was merely instituted by the same parties at or about the same time and decided on the same day, but which involved an entirely separate issue, as will appear.

In substance, the subject complaints challenged the correctness of the final 1957 second class railroad assessments of the plaintiffs in the various respondent municipalities. These assessments are made annually by the Director of the Division of Taxation (an agency of the State of New Jersey) pursuant to his statutory powers and obligations as set forth in R.S. 54:29a-18.* Under this section the

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* R.S. 54:29A-18 reads in part:

"Any taxpayer or the Attorney General on behalf of the State and of the taxing districts claiming that error has been made in the commissioner's valuations may, * * * file a petition

*(Continued on following page)*

Director conducts a preliminary hearing prior to his final determination, which must come down on or before March 15th of the particular year. Thereafter, further administrative review is afforded under another section of the statute (R.S. 54:29a-33)** by appeals to the Division of Tax Appeals, a quasi-judicial body having complete power to determine the issue of true value and discrimination.

On March 15, 1957, pursuant to the mandate of R.S. 54:29a-18, the Director, as head of the Division of Taxation, made his final assessment and certified the 1957 second class railroad assessments of all of the petitioning railroads in each of the respondent municipal taxing districts. In that connection, he issued his "Findings and Conclusions" in which he recognized that he had the power to reduce below true value when necessary to prevent discrimination, but found that the proof in his opinion was insufficient to support such a determination (App. D, p. 22a).

On or about April 5, 1957, petitioners filed the "subject complaints" in the Superior Court of New Jersey, their

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*(Continued from preceding page)*

for review specifying the grounds of complaint and the relief sought. * * * The commissioner shall conduct a hearing upon such petition, shall review the valuations of which it complains, shall make his determination thereon and correct the same as shall appear just before the fifteenth day of March following the filing of the petition.

"The commissioner shall, on or before said fifteenth day of March, certify to each county board of taxation in the several counties the value of Class II property, situate in each taxing district in the county, which certification shall contain such corrections as shall be made pursuant to this section."

** R.S. 54:29A-33 reads in part:

"* * * If it shall be made to appear upon such hearing that any such assessment or tax is illegal, excessive, insufficient or that there has been illegal discrimination in the assessment, the board (Division of Tax Appeals) shall correct, adjust and equalize such assessment or tax."

primary purpose being to obtain a review of these assessments in the New Jersey courts, prior to the exhaustion of the administrative remedies in the Division of Tax Appeals. This was done not on the theory that the state remedy was inadequate as is now claimed in the petition for certiorari, but upon the concept that the remedy was adequate to obtain the relief sought. The complaint sought a judgment "setting aside" the assessments upon the ground that the assessments were illegal and unconstitutional in that they were assessed higher than other taxpayers in the municipality concerned, as a result of which they were discriminated against in violation of the state and federal constitutions (Superior Court Record, p. 7a). All of the respondents herein moved to dismiss each complaint primarily on the ground that "plaintiff has not exhausted its administrative remedies" (Superior Court Record, p. 48a). The motion was denied and respondents appealed.

On February 17, 1958, the Supreme Court of New Jersey handed down its opinion dismissing all of the subject complaints for failure to exhaust administrative remedies. This opinion is known as *Central R.R. Co.* v. *Neeld*, 26 N. J. 172, 139 Atl. 2d 110 (Sup. Ct. N. J. 1958) and is printed by the petitioners as Appendix A at page 1a and is hereinafter referred to as the "subject opinion." A judgment dated February 17, 1958 was then entered on this opinion, printed by the petitioners as Appendix B at page 19a. This is the judgment which the petitioners seek to review in the present application. No other judgment is sought to be reviewed.

On May 7, 1957, while the "subject complaints" were pending but prior to their ultimate dismissal, all of the petitioners herein (save the Pennsylvania) filed the so-called "companion complaints." These complaints sought the transfer of virtually all prior causes then pending before the Division of Tax Appeals to the Superior Court of New Jersey, by reason of delays in their disposition by the Division. In a "companion" decision, also known as *Central R.R. Co.* v. *Neeld*, 26 N. J. 188, 139 Atl. 2d 119 (Sup. Ct. N. J. 1958), printed by the petitioners as Appendix E at page 27a, these complaints were also dismissed, the court reasoning: that although delays undoubtedly existed, alleviative measures had recently been taken by the Division to dispose of all pending cases; that no formal applications by these petitioners had been made to the Division for an earlier determination of the railroad appeals; and that relief would be denied "upon the limited showing made." The judgment of the court in this separate matter was similarly issued on the same day. The petitioners do not challenge the propriety of this decision and the present proceedings do not seek a writ of certiorari to review this judgment.

In May of 1957, during the pendency of the subject complaints, all of the petitioners and respondents herein filed appeals and cross-appeals to the Division of Tax Appeals from the determination of the Director in regard to the 1957 assessments, the identical subject matter involved in the subject complaints (App. A, p. 6a). These appeals are pending.

Under the doctrine that all facts well pleaded are admitted by defendants' motion to dismiss the complaints for failure to exhaust administrative remedies, petitioners assert among other things (p. 12) "it is not disputed in this case that petitioners' property was assessed at true value." Petitioners appear to be contending that by reason of these "admissions" they are entitled to the ultimate relief sought. Obviously facts which are admitted for the purpose of a motion only, cannot be made to support petitioners' affirmative case. If the motion were denied, the "admissions" no longer exist, and the petitioners, as plaintiffs, must proceed with proofs. If granted, as was the case, petitioners have the opportunity and the burden of proceeding before the Division of Tax Appeals. In either case, the “admissions” avail them nothing.

But there is another reason why it cannot be said that the respondents admit that the petitioners assessments are at true value. Paragraph 8 of each complaint alleges that the petitioners contend the “said assessments were at values in excess of true value,” and paragraph 9 specifically recites that the respondents contend the Director's valuations were “below true value”*. Obviously, matters which appear on the very face of the complaint to be contested, cannot be said to have been admitted by the respondents' motion. The true value issue must be decided before it can be determined whether there is any discrimination. And this for the reason that petitioners' property may be so *undervalued* (as respondents contend) that discrimination cannot be said to exist. The true value issue remains undetermined. This, together with the discrimination issue, are the subject of the appeals and cross appeals actually pending before the Division of Tax Appeals. As the New Jersey Supreme Court stated (26 N. J. at p. 181, App. A, p. 11a):

> “The Director found that the factual proofs before him were insufficient to establish any illegal discrimination within the principles expressed in *Delaware, Lackawanna and Western R.R. Co.* v. *Neeld, supra.* Accordingly, he assessed the Class II properties at true value and his assessments, subject to upsettal or review, is entitled to the presumption of correctness. See *Delaware, L. & W. R.R. Co.* v. *City of Hoboken,* 16 N. J. Super. 543, 549 (App. Div. 1951), reversed on other grounds, 10 N. J. 418 (1952). The railroads may, of course, have his assessment reviewed on appeal to the Division of Tax Appeals, and such appeal

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* Superior Court Record, pp. 2a, 3a, 11a, 19a, 20a, 27a, 28a, 36a 37a.

has in fact been taken. The authority of the Division to correct the assessment if it is excessive or if there has been illegal discrimination is clear. R.S. 54:29a-33; *Gibraltar Corrugated Paper Co.* v. *North Bergen Tp.*, 20 N. J. 213 (1955). The burden of introducing adequate valuation and other relevant testimony to establish excessive assessment or illegal discrimination will justly rest on the railroads for in this respect their situation does not differ from the ordinary appealing taxpayer who carries a similar burden. In view of the highly specialized nature of the agency involved and the factual issues presented, the rule requiring exhaustion of administrative remedies seems to be patently applicable. * * *"

## Summary of Argument

The jurisdictional prerequisite in support of a petition for certiorari under 28 U.S.C. Sec. 1257(3) has not been met by the petitioners in this case. To satisfy the jurisdictional requirement, it must affirmatively appear not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the case, and that it was actually decided; or that the judgment as rendered could not have been given without deciding it. In the present case the subject complaints were dismissed on the exclusive application of local law, for failure to exhaust administrative remedies. No federal question whatsoever was decided by the New Jersey Supreme Court. Moreover, the federal question raised in the petition for certiorari, namely, the inadequacy of the state remedy by federal constitutional standards, was neither presented for decision before the state court, nor was it necessary to the decision.

Assuming, however, for the purpose of argument only, that this court has jurisdiction to entertain the present petition, the writ should nevertheless be denied. The petition is based upon the inadequacy of the state remedy to afford relief from an allegedly discriminatory tax assessment under the doctrine of *Hillsborough* v. *Cromwell*, 326 U. S. 620, 90 L. Ed. 358, 66 S. Ct. 445 (1944); and *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 67 L. Ed. 340, 43 S. Ct. 190 (1923). It is evident, however, that the New Jersey remedy is plainly adequate, since the court of last resort in this state has specifically adopted and applied the rationale of these federal cases.

## ARGUMENT

### POINT I

**No federal question having been decided in the New Jersey Supreme Court, this Court is without jurisdiction to issue its writ of certiorari.**

Petitioners' application for certiorari is brought under 28 U.S.C. Sec. 1257 (3). To confer jurisdiction thereunder, it must appear affirmatively from the record "not only that a federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause"; and that "the federal question was actually decided or that the judgment as rendered could not have been given without deciding it." *Southwestern Bell Telephone Co.* v. *Oklahoma*, 303 U. S. 206, 82 L. Ed. 571, 58 S. Ct. 528 (1938). This has been an interpretation of the statute of long standing by this Court. *DeSaussure* v. *Gaillard*, 127 U. S. 216, 32 L. Ed. 125, 8 S. Ct. 1053 (1888); *Johnson* v. *Risk*, 137 U. S. 300, 34 L. Ed. 683, 11 S. Ct. 111 (1890); *Walter A. Wood Co.* v. *Skinner*, 139 U. S. 293, 35 L. Ed. 193, 11 S. Ct. 528 (1891); *Mellon Co.* v. *McCafferty*, 239 U. S. 134, 60 L. Ed. 181, 36 S. Ct. 94 (1915); *Dixon* v. *Duffy*, 344 U. S. 143, 97 L. Ed. 153, 73

S. Ct. 193 (1952); *Edelman* v. *California*, 344 U. S. 357, 97 L. Ed. 387, 73 S. Ct. 293 (1953); *Black v. Cutler Laboratories*, 351 U. S. 292, 100 L. Ed. 1188, 76 S. Ct. 824 (1956); *Stembridge* v. *Georgia*, 343 U. S. 541, 96 L. Ed. 1130, 72 S. Ct. 834 (1952); *Durley* v. *Mayo*, 351 U. S. 277, 100 L. Ed. 1178, 76 S. Ct. 806 (1956).

The determination of the New Jersey Supreme Court was based exclusively on the application of local law, namely that the petitioners failed to exhaust their state administrative remedies (App. A, pp. 1a to 15a). No federal question was decided, nor was such determination essential to the disposition of the cause below. Manifestly, this Court is without jurisdiction.

## POINT II

### The federal constitutional question now presented is raised for the first time in this Court which is therefore without jurisdiction to grant certiorari.

The proceedings below were initiated by a series of complaints in the New Jersey Superior Court seeking to set aside and reduce the 1957 Class II railroad assessments levied against the petitioners by the Director of the Division of Taxation pursuant to state law, upon the ground that the assesments were illegal and unconstitutional in that they were assessed higher than other taxpayers of the municipalities concerned, as a result of which they were discriminated against in violation of state and federal constitutions (Superior Court Record, p. 7a). On appeal to the New Jersey Supreme Court by the respondent municipalities, each of the complaints was dismissed for failure to exhaust administrative remedies under state law, as already indicated.

The petition for certiorari represents a departure from the grounds of relief sought by these petitioners in the subject complaints in the New Jersey courts. There the petitioners sought a reduction of their 1957 assessments in the courts, rather than in the available administrative tribunal, on the ground that the assessments were discriminatory as violative of the Fourteenth Amendment. Upon this basis, petitioners asserted their right to a reduction of their assessments to the level of other taxpayers; and the complaints contained no challenge to the adequacy of the New Jersey remedy either in the courts or in the administrative tribunals, by federal constitutional standards. On the contrary, the proceedings in all of the courts below were consistent with the concept that the New Jersey remedy was wholly adequate to accomplish the relief sought.

The present petition for certiorari now rejects this position and asserts for the first time that the remedy under New Jersey law is inadequate to grant the relief sought by the original complaints. The petition specifically presents the question "whether there is any adequate remedy, either in the administrative tribunals or in the courts of New Jersey, * * *" to obtain the assessment reductions sought. This is premised upon the further claim that the only relief available in New Jersey imposes "an intolerable burden" and is "plainly inadequate" and, therefore, violative of their rights under the Fourteenth Amendment (Petition, pp. 11-12). Thus, this Court is requested to review a decision of the New Jersey Supreme Court upon a constitutional ground never before raised. It was not until after the New Jersey Supreme Court held in the subject opinion that the remedies before the administrative tribunal must be exhausted that the claim is made that the local remedies are constitutionally inadequate.

Constitutional questions not raised in the state courts cannot be presented for the first time in this Court by petition for certiorari. *Edelman* v. *California, supra*; *Mutual Life Insurance Co.* v. *McGrew*, 188 U. S. 291, 47 L. Ed. 480, 23 S. Ct. 375 (1903); *Hulbert* v. *Chicago*, 202 U. S. 275, 50 L. Ed. 1026, 26 S. Ct. 617 (1906).

## POINT III

**Assuming that this Court has jurisdiction to entertain the petition, the remedy in the New Jersey tribunals is adequate within the requirements of the Fourteenth Amendment, and the writ therefore should be denied.**

Even if we were to assume *arguendo* that this Court has jurisdiction to entertain the present petition, notwithstanding Points I and II hereunder, the writ should nevertheless be denied because the New Jersey remedy is plainly adequate.

It should be noted parenthetically that the federal courts will not ordinarily interfere in a state proceeding prior to the exhaustion of administrative remedies provided by statute, and it is for the state courts to determine whether the statutory remedy is exclusive or cumulative.* Here the petitioners seek review of the very state court decision which holds that the state administrative remedy is exclusive, "there being no discernible interest of justice" to justify the state court's intervention (App. A, at p. 11a). Thus, there was no adjudication on the merits, this being left to the administrative tribunal.

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* *Altschul* v. *Gittings*, 86 Fed. 200 (C. Ct., D. of Ore. 1898); *Dundee Mortgage Trust Investment Co.* v. *Charlton*, 32 F. 192 (C. Ct., D. of Ore. 1887); *Northern Pacific R. R.* v. *Patterson*, 154 U. S. 130, 38 L. Ed. 934, 14 S. Ct. 977 (1894); *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 53 L. Ed. 150, 29 S. Ct. 67 (1908); *Porter* v. *Investors Syndicate*, 286 U. S. 461, 76 L. Ed. 1226, 52 S. Ct. 617 (1932), aff'd on rehearing 287 U. S. 346, 77 L. Ed. 354, 53 S. Ct. 132 (1932); *Bacon* v. *Rutland R. R. Co.*, 232 U. S. 134, 58 L. Ed. 538; 34 S. Ct. 283 (1914); *Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300, 82 L. Ed. 276, 58 S. Ct. 199 (1937); *First National Bank of Greeley* v. *Bd. of Cty. Commissioners of Cty. of Weld*, 264 U. S. 450, 68 L. Ed. 784, 44 S. Ct. 385 (1924). See also *Phyle* v. *Duffy*, 334 U. S. 431, 92 L. Ed. 1494, 68 S. Ct. 1131 (1948), reh. den. 334 U. S. 862, 92 L. Ed. 1782, 68 S. Ct. 1526 (1948); *Mellon Co.* v. *McCafferty*, *supra*; *Osment* v. *Pitcairn*, 317 U. S. 587, 87 L. Ed. 481, 63 S. Ct. 21 (1942), cert. den. 320 U. S. 792, 88 L. Ed. 477, 64 S. Ct 206 (1943).

The basis of petitioners' position is that the administrative and judicial remedies afforded in New Jersey in discrimination cases are inadequate, and that this Court should entertain the petition on authority of *Hillsborough v. Cromwell*, 326 U. S. 620, 90 L. Ed. 358, 66 S. Ct. 445 (1946), which involved a proceeding initiated in a federal court. The present petition seeks appeals from a state court decision. In Hillsborough, this Court declared without qualification that the New Jersey remedy was not adequate to protect taxpayer's rights under the federal Constitution. But petitioners' reliance on Hillsborough is completely unjustified for the reason that the basic fabric of the New Jersey law has undergone such radical change subsequent to that decision, that the circumstance which impelled the court to take jurisdiction in that case no longer exists.

Prior to Hillsborough, the doctrine of *Royal Manufacturing Co. v. Board of Equalization*, 76 N. J. L. 402, 70 Atl. 978 (Sup. Ct. of N. J., 1908), aff'd 78 N. J. L. 337, 74 Atl. 525 (Ct. of E. & A. of N. J., 1909), obtained in New Jersey. Under this decision, a taxpayer singled out for discriminatory taxation could not obtain relief by a reduction of his own assessment, but was forced to seek the upward revision of all other property by proving their true value. Since Hillsborough, this constitutional impediment has been eliminated by several recent historic decisions of the New Jersey Supreme Court.

The first of these was *Baldwin Construction Co. v. Essex County Board of Taxation*, 16 N. J. 329, 108 Atl. 2d 598 (Sup. Ct. of N. J. 1954) wherein the Royal doctrine was finally overruled. Charging that the jurisdiction before the administrative tribunals was at best uncertain, the Baldwin complaint sought a judgment in the courts declaring an upward revision of the plaintiff's assessments to be unconstitutionally discriminatory. The lower court had retained jurisdiction on the ground that the remedy in the administrative tribunals was doubtful.* The Supreme Court, however, determined the matter on the merits without deciding the question of the jurisdiction of the administrative tribunals. This decision at long last flatly overruled the Royal doctrine and the court specifically adopted the rationals of the *Hillsborough* and other federal cases on the subject.**

In Baldwin the plaintiffs charged that the upward revision of their assessments without disturbing the remaining taxpayers had caused their property to be assessed "in excess of the same standard of value" of other properties, and was therefore unconstitutional. As to this basic constitutional issue the New Jersey Supreme Court laid down a rule identical with that previously propounded by this court in cases construing the Fourteenth Amendment, and held the assessment increases to be nugatory. In that decision the New Jersey court declared (16 N. J. at p. 339):

> "By an amendment to the 1844 State Constitution adopted in 1875, Article IV, Section VII, paragraph 12, it was directed that property 'be assessed for taxes under general laws, and by uniform rules, according to its true value.' Accordingly, the implementing statutes embodied the standard of true value. L. 1906,

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* See 28 N. J. Super. 110, 100 Atl. 2d 341 (Super. Ct. of N. J., App. Div. 1953), 24 N. J. Super. 252, 93 Atl. 2d 800 (Super. Ct. of N. J., Law Div. 1952).

** *Hillsborough Township v. Cromwell, supra; Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 67 L. Ed. 340, 43 S. Ct. 190 (1923); *Cumberland Coal Co. v. Board of Revision of Tax Assessments*, 284 U. S. 23, 76 L. Ed. 146, 52 S. Ct. 48 (1931); *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 76 L. Ed. 265, 52 S. Ct. 133 (1931); *Sunday Lake Iron Co. v. Wakefield Township*, 247 U. S. 350, 62 L. Ed. 1154, 38 S. C. 495 (1918).

c. 120, R.S. 54:3-13; L. 1918, c. 236, R.S. 54:4-1, 12, as later amended, 23, also amended; L. 1934, c. 191, R.S. 54:3-17; L. 1934, c. 191, R.S. 54:3-18; L. 1918, c. 236, R.S. 54:4-36, 46, 47, 48.

"But the 1947 Constitution, Article VIII, Section I, paragraph 1, provides that property shall be 'assessed for taxation under general laws and by uniform rules,' and 'All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value.' " * * *

* * *

"And were the constitutional provision of a radically different tenor and import, the equal protection clause of the Fourteenth Amendment would prevail, for the right of equal treatment thereby secured 'protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class'; he may not complain 'if equality is achieved by increasing the same taxes of other members of the class to the level of his own'; the constitutional requirement 'is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class.' *Hillsborough Township* v. *Cromwell*, 326 U. S. 620, 66 S. Ct. 445, 90 L. Ed. 358 (1946). This latter was found to be the case in New Jersey under *Royal Mfg. Co.* v. *Board of Equalization of Taxes*, 76 N. J. L. 406 (Sup. Ct. 1908), aff'd 78 N. J. L. 337 (E. & A. 1909), holding that the county boards are obliged to secure taxation of all property at its true value, and a taxpayer so assessed who is the victim of discriminatory taxation may have equalization, not by reduction of his own assessment, but by proceedings to raise the assessments of other members of the class, and so, said Mr. Justice Douglas in the Hillsborough case, 'it is plain that the state remedy is not adequate to protect respondent's rights under the federal Constitution.'

"Earlier, Chief Justice Taft, noting a conflict of view as to what should be done where one or a few of a class of taxpayers are assessed at the full true value of their property, in accord with a constitutional or statutory requirement, and the rest of the class are intentionally assessed at a much lower percentage, in violation of the law, declared:

> "'This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirements of statute. The conclusion is based on the principle that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.' *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340 (1923)

"*Vide Cumberland Coal Co. v. Board of Revision of Tax Assessments*, 284 U. S. 23, 52 S. Ct. 48, 76 L. Ed. 146 (1931); *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 52 S. Ct. 133, 76 L. Ed. 265 (1931)."

"But it goes without saying that mathematical precision in the valuation of property for taxation is not requisite, nor is it attainable. Absolute equality is impracticable. The design of the equal protection clause of the Fourteenth Amendment, related to the particular field, is security against intentional systematic discrimination, and thus to insure the substance of the basic right of equality; mere errors of judg-

> ment are not enough; 'There must be something more, * * * something which, in effect, amounts to an intentional violation of the essential principle of practical uniformity.' *Sunday Lake Iron Co.* v. *Wakefield Township*, 247 U. S. 350, 38 S. Ct. 495, 62 L. Ed. 1154 (1918); *Sioux City Bridge Co.* v. *Dakota County*, cited supra. To the same effect: *Cumberland Coal Co.* v. *Board of Revision of Tax Assessments*, cited supra; *Iowa-Des Moines National Bank* v. *Bennett*, cited supra."

In the following year all jurisdictional doubt to relief before the administrative tax tribunals was also removed in *Gibraltar Corrugated Paper Co.* v. *North Bergen*, 20 N. J. 213, 119 Atl. 2d, 135 (Sup. Ct. of N. J. 1955). Here the court reversed a determination of the Division of Tax Appeals that it had no jurisdiction to reduce below true value, and in so doing reaffirmed the doctrine already laid down in the *Baldwin* case, stating (20 N. J. at p. 219):

> "In *Baldwin Construction Co.* v. *Essex County Board of Taxation*, supra, we held that taxpayers who were visited with discriminatory assessment burdens might seek relief in the courts of this State in accordance with the principles laid down in *Hillsborough Township* v. *Cromwell*, 326 U. S. 620, 66 S. Ct. 445, 90 L. Ed. 358 (1946), thus overruling the doctrine of *Royal Mfg. Co.* v. *Board of Equalization of Taxes*, 76 N. J. L. 402 (Sup. Ct. 1908), affirmed 78 N. J. L. 337 (E. & A. 1909) which placed an insuperable task upon an aggrieved taxpayer to himself seek an upward revision of all other assessments in his district to true value. In obeisance to the requirements of the Fourteenth Amendment to the Federal Constitution and the mandate of equality in property assessment of the new State Constitution we assured relief against discriminating treatment although it occurred below

> the true value level. The dominant consideration was recognized to be equality of burden which by virtue of its constitutional foundation must override the statutory standard where the latter has not been manifested in fact to achieve equality.
>
> "The present issue, which was not squarely decided in the Baldwin case, supra, is whether the administrative agencies must also apply the rule of dominant equality in affording relief in their quasi-judicial capacities."

* * *

(20 N. J. at p. 222):

> "A taxpayer feeling discriminated against by the assessed valuation of other property in the district in comparison with his own assessment may appeal to the county board of taxation, R.S. 54:3-21, as am. L. 1945, c. 125. Determinations or judgments made by the county board may be appealed to the Division of Tax Appeals, pursuant to R.S. 54:2-35, as am. L. 1946, c. 161, or R.S. 54:2-39, as am. L. 1944, c. 240, L. 1946, c. 161, L. 1954, c. 115. The Division is to 'give such judgment therein as it may think proper.' R.S. 54:2-35. Although R.S. 54:2-39 directs that the petition shall seek relief by a general prayer that the assessment be increased or decreased to the true value of the property in question, there is no mandate that relief of the Baldwin variety cannot be rendered. If interpreted otherwise the entire statutory appeal is rendered impotent to persons aggrieved through failure of a local assessor to perform his statutory duty. The statutory appellate procedure and remedy must accommodate the constitutional requisite."

The foregoing decisions in the court of highest authority in this state, establish the adequacy of the New Jersey remedy beyond doubt. Since these decisions, the New Jersey Supreme Court has taken the opportunity to reaffirm the same principles in other cases.

One of these was *Delaware, Lackawanna and Western R.R. Co.* v. *Neeld*, 23 N. J. 561, 130 Atl. 2d 6 (Sup. Ct. of N. J. 1957) hereinafter referred to as the "Lackawanna case," involving the 1956 Class II assessment of the Lackawanna. The background leading to this proceeding may be stated thus: Under R.S. 54:1-35.1, *et seq.*,* there is promulgated each year a table of equalized valuations used in the calculation and apportionment of school aid pursuant to the State School Aid Act of 1954 (R.S. 18:10-29.30). Under R.S. 54:1-35.3 there is determined a ratio of aggregate asssesed to aggregate sales price of real estate in each taxing district. This is done for each municipality by a mathematical averaging of a wide variety of ratios of assessment to selling price. At the review hearings conducted before the Director in accordance with the statute, the Lackawanna requested of the Director that he reduce his assessments to the level represented by the average ratios. The Director took the position that he was powerless to reduce below true value as a jurisdictional matter. Accordingly, the 1956 assessment of the Lackawanna was placed at a figure which the Director conceived to be the true value of the Lackawanna property. Thereupon the Lackawanna filed a complaint in the Superior Court alleging that the ratables in the respondent taxing district were at a common ratio and that the assessments of the Lackawanna were above that level. Upon this basis, the Lackawanna sought the following relief: a declaratory judgment that the Director had the power and duty to make the final Class II railroad assessments at less than true value when necessary to prevent discrimination; an adjudication that the refusal of the Director to so reduce the second class valuation for 1956 constituted an unreasonable and unconstitutional discrimination against the plaintiff; and a judgment in the nature of mandamus demanding the Director to reduce the assessments by multiplying his concept of true value by the ratios aforementioned. Conceiving that the average ratios were conclusive proof of the alleged common level, the Lackawanna moved and the lower court granted a summary judgment for all the relief sought; and this despite the fact that the respondent municipalities filed affidavits disputing the fact of discrimination and the figure of true value determined upon. On appeal, the Supreme Court affirmed that portion of the judgment below which declared that the Director had the authority to reduce below true value when necessary to prevent discrimination, holding in this respect that the Director's power was no different than those which the Division of Tax Appeals had. The court found (23 N. J. at p. 573):

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* R.S. 54:1-35.1 reads in part:

> "On or before the first day of October in each year the Director of the Division of Taxation, in the State Department of the Treasury shall promulgate a table of equalized valuations to be used in the calculation and apportionment of distributions pursuant to the State School Aid Act of 1954. * * *"

R.S. 54:1-35.2 reads:

> "The table of equalized valuations shall list each taxing district in the State, together with (1) its aggregate assessed valuation of real property (exclusive of Class II railroad property); (2) the average ratio of assessed to true value of such real estate in the taxing district, determined as hereafter provided; (3) the aggregate true value of real estate in each taxing district determined on the basis of such ratios; (4) the assessed valuation of Class II railroad property in the district; (5) assessed valuation of all personal property in the district; and (6) the sum of the foregoing items numbered (3), (4) and (5) for each taxing district, which shall be known as the 'equalized valuation.'"

R.S. 54:1-35.3 reads in part:

> "True value for the purposes of this act shall be deemed to be valuation at current market prices or values, determined in such manner as the director may, in his discretion, select. The director shall determine the ratio of aggregate assessed to aggregate true valuation of real estate of each taxing district * * *."

> ing to a constitutional or statutory mandate, and the rest of the class are intentionally assessed at a percentage of true value, in violation of the law, the 'right of the taxpayer whose property alone is taxed at 100% of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirements of the statute'; where 'it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.' *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A.L.R. 979 (1923). See also *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 52 S. Ct. 133, 76 L. Ed. 265 (1931); *Cumberland Coal Co. v. Board of Revision*, 284 U. S. 23, 52 S. Ct. 48, 76 L. Ed. 146 (1931)."

* * *

> "But mathematical precision in the evaluation of property for taxation is not requisite, nor is it attainable. Absolute equality is impractical. The design of the equal protection clause of the Fourteenth Amendment, related to the particular field, is protection against intentional systematic discrimination, and thus to insure the essence of the basic right of equality: mere errors of judgment are not enough; there 'must be something more,—something which, in effect, amounts to an intentional violation of the essential principle of practical uniformity.' *Sunday Lake Iron Co. v. Wakefield Township*, 247 U. S. 350, 38 S. Ct. 495, 62 L. Ed. 1154 (1918); *Sioux City Bridge Co. v. Dakota County*, cited *supra*."

Turning to the question of the summary judgment entered below on the basis of the conclusive application of the average ratios as proof of a common standard, the court held (23 N. J. at pp. 573-575):

> "The Director's statutory review, N.J.S.A. 54:29a-18, would be null were it bound by the 'true value' standard in the exercise of the 'corrective' process, even though such course would deny the taxpayer's constitutional right of uniformity and equality, the basic principle of the 'true value' formula. Requiring adherence to the full value concept in that context would be a contradiction in terms, a construction repugnant to reason and logic * * *."

On the basic issue of unconstitutional discrimination, the court again took the opportunity to reaffirm the doctrine of the *Baldwin* and *Gibraltar* cases, holding (23 N. J. at p. 569):

> "As said in *Baldwin*, the dominant principle of the new constitutional mandate is equality of treatment and burden; and this was of the essence of the old constitutional provision as well. The standard of true value is but a means of achieving uniformity and equality, the predominant consideration in the distribution of the tax burden in virtue of the basic guaranties of due process and the equal protection of the laws. Were the rule of the State Constitution radically different in attribute and quality, the Fourteenth Amendment would prevail, for the equality of treatment thereby secured protects the individual from state action making for discriminatory imposts 'not imposed on others of the same class'; and the constitutional requirement 'is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class.' *Hillsborough Township v. Cromwell*, 326 U. S. 620, 66 S. Ct. 445, 90 L. Ed. 358 (1946).
>
> "Where one or a few of a class of taxpayers are assessed at the full true value of their property, accord-

"But Lackawanna's argument to sustain the judgment proceeds on the fundamental misconception that the sales-assessment ratios found by the Director for the apportionment of the moneys provided for state school aid under N.J.S.A. 54:1-35.1, are 'competent proof in an individual discrimination case,' and 'conclusive upon him as a matter of law,' citing *City of Passaic* v. *Passaic County Board of Taxation*, 18 N. J. 371 (1955).

"There is an essential difference between a common or uniform assessment ratio of true value applicable to all alike in the same class and the 'average' assessment ratio of true value. The 'common' ratio imports general equality in the incidence of the tax, the equality of burden that is of the essence of constitutional uniformity; the 'average' ratio is the arithmetical mean or median of varying ratios of true value, necessarily making for unequal proportions of value and thus for inequality of treatment and burden in the apportionment of the tax as between the several property owners. *Switz* v. *Township of Middletown*, this day decided, 24 N. J. 1 (1957)

"The sales-assessment ratio data do not provide the basis for an intra-municipal true value assessment of individual parcels of real property. As observed in *Switz*, Director Neeld has made abundantly clear the inherent probative limitations of this process in an article published in *New Jersey Municipalities*, January 1, 1956, 'The Gibraltar case * * * Full True Value Assessments': 'Sales-assessment ratio date,' he there affirmed, 'are usable for two basic purposes: a—To test the quality of the assessment roll of a district, and b—To approximate the aggregate true value of real property within a district for various apportionment purposes,' and 'are not intended nor considered to be useful for the purpose of making full value assessments against specific parcels of real property'; since the result is merely an 'average ratio of assessed to true value of all of the properties on the roll which necessarily means that there are many with ratios far above and many with ratios below this average,' and while such data 'will have value in aiding the administrative agencies to determine the existence of inequalities within a district, and may even assist the courts in dealing with cases involving alleged discrimination, nevertheless, such data cannot be employed as a substitute for the expertness, judgment and discretion required in formulating an original assessment for each parcel of property on a full true value basis.'

"The sales-assessment ratio data have been used for equalization by the aggregate method for the apportionment of county taxes among the municipalities, and the proportional distribution of state school aid. See *Gibraltar Corrugated Paper Co.* v. *North Bergen Township, supra; City of Passaic* v. *Passaic County Board of Taxation*, 18 N. J. 371 (1955); *Borough of Totowa* v. *Passaic County Board of Taxation, supra.* This has to do with the inter-municipal sharing of the county tax burden and state school benefits.

"Yet this is not to say that sales-assessment data are conclusive of equalization for all statutory purposes. * * *"

The upshot of the matter was that the portion of the mandate below which reduced the assessment by use of the average ratios as a multiplier was reversed, and the matter remanded to the administrative assessing agency whence the matter originated, namely, the Director of the Division of Taxation, for further proofs. It was concluded (23 N. J. p. 575) that since "the adjudicative function of the Division Director is established", namely the right to reduce below true value when necessary to prevent discrimination, "there was no occasion for judicial intervention before the exhaustion of administrative remedies" which were "wholly adequate, and the normal course in the circumstances."

The keystone of the plaintiff's claim of inadequacy of the New Jersey remedy rests upon the treatment accorded the average ratios in the Lackawanna case. At page 17 of the petition, it is stated that the court "thwarted the giving of relief to taxpayers" by holding that a "taxpayer could not prove the common level of assessment" by the "use of sales ratios". And at page 27 the railroads claim that they are "deprived of due process unless they are permitted the use of the average ratios."

But it is evident that the petitioners were not deprived of the "use" of the average ratios. They were simply denied their use as a "conclusive" means of obtaining relief. No other contention would be consistent with the holding in the *Lackawanna* case. The court clearly indicated they are admissible in evidence as "an assist to the court in dealing with cases involving alleged discrimination", but that standing alone, they did not prove the common ratio contended for by the plaintiff in the case.

At page 25, petitioners state that "the use of the average ratios developed from sales studies received the approval of this court in *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 67 L. Ed. 340, 43 S. Ct. 190 (1923)." If by this statement the petitioners mean to imply sanction for the sole use of average ratios to prove a discrimination case, this is utterly incorrect, since the result in that case was exactly the same as achieved in the *Lackawanna* case. The court did not find discrimination based on the use of average ratios, but very carefully pointed out it was remanding the case for further proof on the issue of discrimination, with *instructions to act in the event discrimination was found*. The court stated (260 U. S. at p. 447):

> "But we construe the action of the court not to be equivalent to a finding that such intentional discrimination existed between the valuation of the Bridge Company's property and that of all other real property and improvements in the county, but rather a ruling that even if it did exist, the Bridge Company must continue to pay taxes on a full 100% valuation of its property. It was on the same principle doubtless, that the District Court ignored the issue of discrimination altogether. It is therefore just that upon reversal we should remand the case for a further hearing upon the issue of discrimination, inviting attention to the well established rule in the decisions of this court, cited above, that mere errors of judgment do not support a claim of discrimination, but that there must be something more * * * something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350, 353.
>
> "The judgment of the Superior Court of Nebraska is reversed and the case is remanded for further proceedings not inconsistent with this opinion."

Not only do the recent New Jersey decisions recognize and adhere to the federal cases which protect taxpayers from treatment by state action which is violative of the Fourteenth Amendment, but the State Supreme Court has provided an additional remedy, not heretofore existent. In *Switz* v. *Middletown*, 23 N. J. 580, 130 Atl. 2d 15 (Sup. Ct. of N. J. 1955), the court held that any taxpayer may bring mandamus to compel the assessors to upgrade to true value assessments of all property in the taxing district, in accordance with the statutory requirement.

The argument by the petitioners that as a result of this decision our court has merely paid "lip service" to the doctrine of the *Hillsborough* case, at the same time re-establishing the principle of the *Poyal* case, is obviously an inappropriate statement. The *Switz* case came down at the same time as the *Lackawanna* case, and involved an entirely different issue. In the *Lackawanna* case, the plaintiffs sought a reduction below true value, wherein the court acknowledged the plaintiff's right to such relief upon adequate proof of intentional systematic discrimination under the federal cases. The *Switz* case involved a successful mandamus proceeding to compel an upgrading of assessments to true value in accordance with the statutory requirement. After providing for postponement of the writ until 1959, to give opportunity for an appropriate revaluation, the court stated (23 N. J. at p. 599):

> "The plaintiff will have her remedy in the statutory tribunals for transgression meanwhile of her right to equality of treatment."

Neither remedy is a substitute for the other and it is obvious the court did not so intend. Moreover, the Switz doctrine completely satisfies the Hillsborough requirement that the state "itself remove the discrimination" rather than impose the burden on the taxpayer. This was completely different than the rule under the *Royal* case.*

In any event, petitioners' claim of discrimination is not yet ripe for review in this Court, for at this juncture they have presented no proofs in support of the charge. In substance, they are dissatisfied with the 1957 assessments fixed by the local assessing authority, the Director of the Division of Taxation; and they ask judicial intervention in an effort to obtain corrective action. But they ignore the obvious principle that discrimination is a question of fact which must be proved as well as alleged. Such proof would ordinarily consist of evidence of the true value of the property accompanied by a further showing that assessments at such true value have been intentionally and systematically fixed above the level of other taxpayers. Unless the true value is first determined, it is impossible to ascertain whether the complaining taxpayer is in fact discriminated against.

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* Under the Royal doctrine, a taxpayer was compelled to seek the upward revision of other properties by a revaluation required to be performed by the taxpayer, under which it was necessary for him to appraise all other parcels of property. This was the burden which was considered to be "intolerable" under Hillsborough. Switz, however, requires the taxing district to itself remove the discrimination by a mandamus proceeding compelling the assessor to revalue all property in the taxing district.

In view of these circumstances, this Court is not in a position at this time to determine whether discrimination in fact has been practiced against the petitioners, and until proof of true value and unequal treatment in the constitutional sense is tendered at the trial level, the same result must obtain. In this connection, it is significant that petitioners persistently overlook the corrective remedies not as yet exhausted by them before the Division of Tax Appeals and the courts of New Jersey; and it cannot be assumed that these tribunals will not weigh the facts and grant relief accordingly. To anticipate that the presentation of adequate proofs upon the question of true value and discrimination will be ignored by the appropriate administrative agency and the courts is wholly without basis, for, as herein shown, New Jersey's decisional law points sharply the other way. In the present posture of the record, the petition seeks little more than an advisory opinion from this Court.

As to the contention that the petitioners have been denied their constitutional rights because they "have no reasonable prospect of having their petitions heard before the Division in the foreseeable future" we again point out that this was the subject of the so-called "companion" complaints, dismissed on motion of the respondents, the propriety of which is not challenged in any direct attack. We submit that these petitioners should not be permitted to attack these dismissals in this collateral manner.

## CONCLUSION

For all of the foregoing reasons, we respectfully submit that the petition be denied on the ground that:

(a) This Court is without jurisdiction to entertain the petition, and alternatively

(b) The remedy in the New Jersey court is entirely adequate.

Respectfully submitted,

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James Rosen,
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Norman Heine,
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Herbert H. Fine,
Leo Rosenblum,
James Rosen,
*On the Brief.*

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IN THE

# Supreme Court of the United States

October Term, 1957

No. 1010

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation of the State of New Jersey, THE PENNSYLVANIA RAILROAD COMPANY, a corporation of the Commonwealth of Pennsylvania; LEHIGH VALLEY RAILROAD COMPANY, a corporation of the Commonwealth of Pennsylvania; THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a corporation of the Commonwealth of Pennsylvania, and ERIE RAILROAD COMPANY, a corporation of the State of New York,

*Petitioners,*

*vs.*

AARON K. NEELD, Director, Division of Taxation in the Department of the Treasury, State of New Jersey, and CITY OF JERSEY CITY, CITY OF HOBOKEN, CITY OF CAMDEN, TOWN OF SECAUCUS, CITY OF NEWARK and TOWNSHIP OF WEEHAWKEN, all municipal corporations of the State of New Jersey

*Respondents.*

## BRIEF FOR RESPONDENT, AARON K. NEELD, DIRECTOR, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID D. FURMAN,
Attorney General of New Jersey,
*Attorney for Respondent,*
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IN THE

# Supreme Court of the United States

October Term, 1957

## No. 1010

◆

The Central Railroad Company of New Jersey, a corporation of the State of New Jersey, The Pennsylvania Railroad Company, a corporation of the Commonwealth of Pennsylvania; Lehigh Valley Railroad Company, a corporation of the Commonwealth of Pennsylvania; The Delaware, Lackawanna and Western Railroad Company, a corporation of the Commonwealth of Pennsylvania, and Erie Railroad Company, a corporation of the State of New York,

*Petitioners,*

*vs.*

Aaron K. Neeld, Director, Division of Taxation in the Department of the Treasury, State of New Jersey, and City of Jersey City, City of Hoboken, City of Camden, Town of Secaucus, City of Newark and Township of Weehawken, all municipal corporations of the State of New Jersey,

*Respondents.*

◆

# BRIEF FOR RESPONDENT, AARON K. NEELD, DIRECTOR, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

## Opinion Below

The opinion of the Supreme Court of New Jersey in this matter is reported in 26 N. J. 172 (1958), App. A of Petition.

## Jurisdiction

Petitioners attempt to invoke the jurisdiction of this Court under 28 U.S.C., §1257(3). Jurisdiction is lacking because the judgment sought to be reviewed is not a "final judgment" within the meaning of this statute. Moreover, no federal right of petitioners has been violated, even if the effect of state law, as alleged by petitioners, is to classify all railroad property for taxation at a higher rate than all other properties.

## Questions Presented

1. Whether a writ of certiorari to a state court must be denied for want of jurisdiction where:
    a. The judgment below is not a "final judgment" in that *de novo* appeals concerning the same subject matter are pending before the State Division of Tax Appeals, from whose decisions further appeals may be taken as of right; and,
    b. The decision of the state court was based upon an adequate, independent, non-federal ground, namely, that petitioners must pursue the available administrative remedy.
2. Whether petitioners have been deprived of a federal constitutional right if the effect of the New Jersey decisions is to classify all railroad property for assessment at a uniform rate higher than all other property.

## Statutes Involved

The proceedings relate to the New Jersey Railroad Tax Law of 1948 (N.J.S.A. 54:29A-1 *et seq.*) and to the New Jersey Statutes governing the assessment of local property other than railroad property, R.S. 54:4-1 *et seq.* Petitioners do not claim either of these statutes is unconstitutional.

The New Jersey Statutes referred to herein are contained in the appendix to this Brief in Opposition except for such statutes as are set out in Appendix N and Appendix O of the Petition.

Petitioners allege a violation of the equal protection clause of the Fourteenth Amendment resulting from the tax treatment of railroad property as compared with property of others.

## Statement

Petitioners seek to review a judgment of the New Jersey Supreme Court dismissing complaints in the Law Division of the Superior Court for petitioners' failure to exhaust their administrative remedies. A petition for a writ of certiorari has been filed from said judgment. A so-called "companion" case was also decided by the New Jersey Supreme Court involving all petitioners except the Pennsylvania Railroad Company. No petition to review this latter judgment has been filed. The only record of the Court below that has been certified under Rule 21(1) is the record pertaining to the case reported in 26 N. J. 172 (Petition, App. A), and not that of the case reported in 26 N. J. 188 (Petition, App. E). The two proceedings were not consolidated in the New Jersey Courts; they were treated as separate cases, with separate dockets in both the Superior Court and the Supreme Court of New Jersey. Therefore, questions raised in the "companion" case will not be answered here. In the case sought to be reviewed, petitioners did not raise below the issue of alleged delay in the handling of tax appeals by the State administrative agency, although they now attempt to argue the point in their petition.

The facts leading to the filing of this petition are as follows. Prior to December 10, 1956, respondent, Aaron K. Neeld, Director (hereinafter referred to as "Director") of the Division of Taxation in the Department of the Treasury, State of New Jersey, determined the value of all property used for railroad purposes in New Jersey. N.J.S.A. 54:29A-17. The railroads, petitioners herein, and the respondent municipalities, pursuant to N.J.S.A. 54:29A-18, filed petitions with the Director claiming error in his valuations. The railroads claimed the assessments were too high; the municipalities claimed the assessments were too low. Hearings were held by the Director on January 29, 1957, and thereafter he certified the assessments against petitioners' properties in New Jersey for the year 1957.* The first phase of administrative review was thus completed.

The railroads and the municipalities then took appeals from the Director's decision to the Division of Tax Appeals and these appeals are now pending. This method of review is provided by N.J.S.A. 54:29A-31.

Notwithstanding the filing and prosecution of appeals before the administrative tribunal in accordance with statutory procedures so provided, the railroads also filed suits in the Law Division of the Superior Court of New Jersey (hereinafter referred to as "Law Division"), seeking to review the determination of the Director. It should be noted that an appeal to the Appellate Division of the Superior Court from a determination of the Division of Tax Appeals is specifically provided for by N.J.S.A. 54:29A-36 and is afforded under R.R. 4:88-8 of the New

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* See opinion below of Justice Jacobs, reported in 26 N. J. 172 (1958), Petition, Appendix A, p. 3a *et seq.*; see also Complaint in Superior Court of New Jersey, Law Division, Docket No. L-7432-56 PW, Appendix to Appellants' Brief in Court below, p. 1a *et seq.*

Jersey Supreme Court Rules (Opinion below, App. A of Petition, pp. 13a to 15a). The scope of review before the Division of Tax Appeals affords petitioners a trial *de novo*.* The Superior Court, Appellate Division, on review, may then exercise original jurisdiction to independently review the facts and make the assessment. *Delaware L. & W. R.R.* v. *Hoboken*, 10 N. J. 418, 424 (1952); *Newark* v. *West Milford Twp.*, 9 N. J. 295, 301 (1952).

The Court below held that petitioners must follow the foregoing administrative procedures for review and that they were not justified in invoking the jurisdiction of the Law Division simultaneously with, or as a substitute for, the established procedure.

## Summary of Argument

The railroads contend that the municipalities have intentionally and systematically assessed local property below true value while railroad property is assessed at or above true value. The municipalities deny these allegations. Although the Director of the Division of Taxation had rendered a determination on this factual issue, in the first stage of review of the assessments he had originally made, appeals were taken to and are now pending in the

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* Any assessment of railroad property made by the Director of the Division of Taxation may be reviewed by the Division of Tax Appeals. N.J.S.A. 54:29A-31. (This section refers to the "State Board of Tax Appeals" and the "Commissioner" rather than the "Division of Tax Appeals" and the "Director" of the Division of Taxation. The "State Board of Tax Appeals" was reconstituted the "Division of Tax Appeals" in the Department of the Treasury by N.J.S.A. 52:27B-52 and N.J.S.A. 52:18-26. The "Commissioner of State Taxation" was reconstituted as the "Director of the Division of Taxation" by N.J.S.A. 54:29A-2.) The review by the Division of Tax Appeals is *de novo*. N.J.S.A. 54:29A-33. *Delaware L. & W. R.R.* v. *Hoboken*, 10 N. J. 418, 425 (1952); *Central R.R.* v. *Neeld*, 26 N. J. 172, 181, 183 (1958).

Division of Tax Appeals where these factual issues are to be tried *de novo*. Further appeals may then be taken by the parties as to matters of law and fact to the Appellate Division of the Superior Court from whose decision review may be sought in the Supreme Court of New Jersey, if warranted. (See: Art. VI, Sec. 5, par. 1, N. J. Constitution; R.R. 1:2-1.)

Notwithstanding that appeals had been taken in the administrative agency, petitioners brought action in the Law Division of the Superior Court seeking to correct said assessments.

The New Jersey Supreme Court held in the instant case that petitioners' actions in the Law Division were untimely as they had not exhausted their administrative remedies. This is sound and basic New Jersey law, consistent with Federal practice, based upon principles discussed thoroughly in the opinion of Justice JACOBS below (App. A of Petition). Petitioners argue now that there is no adequate administrative remedy. They interpret New Jersey case law as requiring proof of discrimination by a standard impossible to meet, relying principally on two decisions of the Appellate Division of the Superior Court. We do not agree that petitioners' interpretation is the view of the New Jersey Supreme Court. A constitutionally valid interpretation should be favored if and when the issue is presented to that court, which can be done by petitioners in the regular course of appeal from the proceedings now pending. It is the State court alone who must decide and interpret its tax laws in the first instance. *Missouri* v. *Dockery*, 191 U. S. 165 (1903).

If there is ambiguity or conflict in the New Jersey decisions a clarification may be had in the State appellate courts at the proper time. The petition herein presents a controversy which is purely in its trial stages. Petitioners may be entirely satisfied at the conclusion of the litigation in New Jersey. It may appear as a factual matter that the railroads have not been unfairly treated, that their properties have been *undervalued*, and that they are taxed at a lower level than others, as the municipalities contend. Railroads are, in fact, given certain preferences by law and practice as compared with other property owners, as will be explained in Point II below. Thus, petitioners are asking this Court to render a decision that may be entirely unnecessary.

The judgment below is not a "final judgment" reviewable here by certiorari. A similar situation was before this Court in *Mellon Co.* v. *McCafferty*, 239 U. S. 134 (1915). It was there held that the duty to resort to administrative and appellate tribunals "could not be escaped by assuming that if they had been resorted to, the wrong complained of would not have been rectified." At 139.

In the *Mellon* case the Oklahoma State courts had held that a corporation, complaining of discriminatory tax treatment as compared with individuals, must pursue its administrative remedies afforded by the State. This Court refused jurisdiction against petitioner's claim that the administrative remedies were unavailing. The court held that the State court judgment rested upon adequate state law grounds irrespective of the claimed federal constitutional right.

A judgment is not final where further proceedings may be had in the state to correct the alleged wrong by a new trial or by further administrative hearings. *Cincinnati Street Railway Co.* v. *Snell*, 179 U. S. 395 (1900); *Laclede Gas Light Co.* v. *Public Service Commission*, 304 U. S. 398 (1938); *Gospel Army* v. *City of Los Angeles*, 331 U. S. 543 (1947).

The court below decided the instant case upon a state procedural rule requiring exhaustion of administrative remedies. Where ~~a~~ judgments rests upon an adequate, independent, non-federal ground, even though a federal question may be involved, this Court will not accept the case for review. *Fox Film Corp. v. Muller*, 296 U. S. 207 (1935); *Herb* v. *Pitcairn*, 324 U. S. 117 (1945).

Moreover, petitioners have not been deprived of a constitutional right, even if their contentions are assumed to be true for the purposes of argument. New Jersey, if it chooses, can assess and tax railroad property as a class at higher rates than other property without violating the Federal Constitution. *Ohio Tax Cases*, 232 U. S. 576 (1914). And if this result is achieved by indirection or practice, contrary to the avowed intent of state law, petitioners cannot complain to this Court. Inadequacy of a remedy is immaterial absent a federal right to be remedied. *Nashville C. & St. L. Ry.* v. *Browning*, 310 U. S. 362 (1940).

The *Nashville* case is virtually identical to the case at hand. The railroad there complained that its property was assessed at full value while non-railroad property was assessed at less than full value contrary to the Tennessee statutes and constitution which required uniform treatment of all classes of property. This Court held that if the practice sanctioned by the Tennessee courts was to assess railroad property as a class at higher rates, nevertheless, no federal constitutional right had been violated. The states can do indirectly, by custom or construction of law, what they can do directly or intentionally by legislative command. The test for federal unconstitutionality is not whether one class of taxpayers is treated differently than another class of taxpayers; it is whether members of the same class are treated differently from each other, a claim that is not made here. *Nashville C. & St. L. Ry.* v. *Browning supra*; *Bell's Gap R.R.* v. *Pennsylvania*, 134 U. S. 232 (1890), *Ohio Tax Cases*, *supra*; *Missouri* v. *Dockery*, *supra*; *Hillsborough* v. *Cromwell*, 326 U. S. 620 (1946).

The writ of certiorari must be denied, therefore, as no federal constitutional right of the railroads has been violated.

## *ARGUMENT*

## POINT I

**The writ of certiorari must be denied for want of jurisdiction where the judgment below is not a "final judgment" and the decision of the State court was based upon an adequate, independent, non-federal ground.**

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1257(3) which provides as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

In *Mellon Co.* v *McCafferty, supra*, this Court unanimously held that the duty to resort to administrative and State appellate tribunals, as required by State law, "could not be escaped by assuming that if they had been resorted to the wrong complained of would not have been rectified." At 139.

In the *Mellon* case, petitioner started suit in a County District Court of Oklahoma to enjoin the collection of state, county and city taxes levied against petitioner, alleging that the assessment was illegal and discriminatory under the State Constitution and under the equal protection and due process clauses of the 14th Amendment. Petitioner alleged that by agreement between the city assessor and the county board of equalization, with approval of the state auditor, property of corporations was assessed at its true cash value, while that of individuals was assessed at 60% of cash value. The lower court dismissed the complaint on demurrer, and the Supreme Court of the State of Oklahoma affirmed. Both State courts dismissed the action on the ground that petitioner failed to allege that it had resorted to administrative remedies provided by State law.

Petitioner there urged that the State courts had erred because the remedies for correcting the assessment complained of were, in fact, not available. This Court examined the administrative procedure for review in Oklahoma. First, there was a city board of equalization with powers to redress the wrong and with authority to equalize assessments. Then an appeal could be had to county board of equalization, with ample power to redress the alleged wrong. There was also a state board of equalization to correct inequalities between counties. Finally, review was available in the County Court as to the county board's action and in the State Supreme Court as to the state board's action.

Petitioner replied that "a resort to these remedies was not required because they would have been unavailing in view of the nature of the wrong complained of." At 138, 139. This Court rejected petitioner's argument. The writ of error was dismissed for want of jurisdiction in that "the judgment below rested upon propositions of state law adequate to sustain it wholly irrespective of the Federal right relied upon * * *."

The *Mellon* case, *supra,* is consistent with a long line of decisions in this court holding that a judgment is not final where further proceedings are contemplated which could determine the controversy on the merits. This is obvious where the judgment orders a new trial or further administrative hearings. *Cincinnati Street Railway Co.* v. *Snell,* 179 U. S. 395 (1900); *Laclede Gas Light Co.* v. *Public Service Commission,* 304 U. S. 398 (1938); *Gospel Army* v. *City of Los Angeles,* 331 U. S. 543 (1947).

In the *Laclede Gas Light Co.* case, *supra,* the Missouri Supreme Court affirmed the judgment of a lower State court and remanded the case to the Public Service Commission for re-hearing in accordance with the views expressed in its opinion. The petitioner complained that the order of the commission fixing the value of its property for rate making purposes was confiscatory, in violation of the 14th Amendment. Petitioner sought to review the judgment of the State Supreme Court. This court held that the appeal must be dismissed, "As we are unable to conclude upon the record before us that the State court has finally disposed of the controversy * * *". At 400.

In the instant case, there is a trial *de novo* pending before the State Division of Taxation. We do not know but that petitioners will be satisfied to drop the litigation upon the outcome of the administrative hearings; and, if not, other proceedings may be had in the state courts for review. The judgment complained of therefore lacks the finality required for certiorari to be granted.

But petitioners argue that it is useless for them to pursue an unavailing administrative remedy. We cannot assume, however, that petitioners are correct in interpreting New Jersey cases to establish a rule which they say makes it impossible to obtain relief in the administrative agency. It is not for petitioners to construe the State law, especially where it cannot be said that we are dealing with "settled" law. We do not accept petitioners' interpretation of the holding in *Delaware, Lackawanna & Western R.R. Co.* v. *Neeld*, 23 N. J. 561 (1957), hereinafter referred to as the "Lackawanna" case. That case simply held that the Director has the right to reduce below true value when required to prevent discrimination. The court said in the *Lackawanna* case as it has said again in the instant case, that the particular issue was peculiarly within the province of the administrative tribunals and that there was no occasion for judicial intervention before the exhaustion of administrative remedies. The case was accordingly remanded to the Director for further proceedings. In passing on the question of proof the court rejected, plaintiff's argument that evidence of sales-assessment ratio data was conclusive of discrimination. The court held this evidence to be admissible but not conclusive upon the Director. If the *Lackawanna* case requires interpretation as to standards of value and proof, petitioners will have the right to obtain this interpretation in New Jersey courts after the determination of their cases pending in the Division of Tax Appeals.

In the instant case petitioners asserted in the State Courts that it was the duty of the Director to correct the assessments according to the standards established in the *Lackawanna* case, and that the Director refused to do so. In their complaint, petitioners demanded judgment among other things, "ordering Director to ascertain the general or common ratio of assessed to true value of locally assessed property * * * " (Appendix to Appellate's Brief, p. 8a). Petitioners did not argue that the standard imposed by the *Lackawanna* case was impossible to meet, and the Court below did not pass upon this question. The Court dismissed the complaint solely upon a state procedural rule: the exhaustion of administrative remedies. Where a State court judgment rests upon an adequate, independent, non-federal ground, even though a federal question may be involved, this court will not accept the case for review. *Fox Film Corp. v. Muller,* 296 U. S. 207 (1935); *Herb v. Pitcairn,* 324 U. S. 117 (1945).

In *Herb v. Pitcairn, supra,* it was said at 125-6:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds (cases cited). The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. *And our power is to correct wrong judgments, not to revise opinions.* We are not permitted to render an advisory opinion. * * * " (Emphasis added)

The writ of certiorari must be denied because (a) the judgment is not final; there are administrative trials *de novo* pending and adequate opportunity for review in the New Jersey courts; and, (b) the sole ground for the decision of the state court is an adequate, independent, non-federal ground.

## POINT II

### Petitioners have not been deprived of a federal constitutional right even if the effect of New Jersey law is to classify all railroad property for assessment at a uniform rate higher than all other property.

Petitioners in the present case argue that their railroad property is assessed at a higher proportion of market value than other local property in New Jersey. They do not say that their property is treated differently from other members of their class, namely, other railroads.

Railroad and non-railroad property assessments arise out of the statutory scheme entrusting their valuation to different officials. Railroad property is valued originally by the Director of the Division of Taxation, pursuant to the "Railroad Tax Law of 1948," N.J.S.A. 54:29A-1, *et seq.;* N.J.S.A. 54:29A-17. Valuation of non-railroad property is done originally by municipal officials. R.S. 54:4-1, *et seq.* Property used for railroad purposes is excluded from "local" assessment and tax procedures by N.J.S.A. 54:4-3.11 and the entire separation of the taxing scheme. Separate statutes set the standards for assessing the two classes of property. The Director is required to assess railroad property at "true value" (N.J.S.A. 54:29A-17); the municipal officials are required to assess local property at "the full and fair (market) value" (R.S. 54:4-23). Petitioners here allege that although the Director is executing his responsibility to the letter of the law in assessing at "true value," the municipal officials are valuing non-railroad property at varying fractions of market value.

Respondent contends that if the effect of the assessment procedures and laws of New Jersey is such as to treat railroad property differently from other property, such classification by custom and practice does not violate the Federal right of equal protection under the laws. Discrimination in treatment among members of the same class is the test of the Federal right. In *Hillsborough* v. *Cromwell*, 326 U. S. 620 (1944), Mr. Justice Douglas in his opinion at 623 states:

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action

> which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the *same class*. The right is the right to equal treatment. He may not complain if equality is achieved by increasing the same taxes of *other members of the class* to the level of his own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an *upward revision of the taxes of other members of the class.*" (Emphasis added.)

The treatment of railroad property differs from the treatment of all other property in New Jersey not only in procedure but in substance as well. Contrary to petitioners' allegations, the railroads have been given certain advantages under New Jersey tax laws not given to others.

Railroad property for tax purposes is defined and classified under N.J.S.A. 54:29A-2 and N.J.S.A. 54:29A-17 as follows:

> Class I is defined as main stem railroad beds not exceeding 100 feet in width;
> Class III embraces all tangible personal property; and
> Class II comprises all other real estate used for railroad purposes.

Class I and Class III railroad properties are taxed at a rate of $12.00 per $1000 of assessed valuation. This rate is fixed by statute. N.J.S.A. 54:29A-20. In 1957, all local property other than railroad property was taxed at the average rate of $83.05 per $1000 of assessed valuation.* The $12.00 per $1000 valuation on more than half of all

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* The statistics referred to above were taken and computed from the 1957 Annual Report of the Division of Taxation, State of New Jersey, pages 37, 44 and 45.

*(Continued on following page)*

assessed railroad property compares favorably with an average tax rate of $83.05 on local property of others. Moreover, the average tax rate on all classes of railroad property, $42.94, compares favorably with the average tax rate on all other local property, $83.05 per $1000 valuation.

So much for tax rates. As to tax assessments it should be noted that the last New Jersey appraisal of structures in railroad use was made in 1911, and this appraisal is still used today as the basis for railroad assessment purposes.*

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*(Continued from preceding page)*

The total assessed valuation of Class II railroad property in 1957 was $171,973,302 (p. 45). The aggregate assessed valuations of all property in New Jersey other than railroad property was $7,601,683,084. (At p. 37; computed by subtracting the Class II railroad valuation from the total shown.) The average tax rate on all non-railroad property is computed by subtracting the total Class II taxes (p. 44) from the aggregate taxes shown on page 37, and dividing by the total assessed valuation of all non-railroad property, as computed above.

The total assessed valuation of all Class I and Class III railroad property in 1957 was $230,426,766. This is computed by taking the total tax on Classes I and III, $2,765,121.20 (p. 45) and dividing by $12.00 per $1000 valuation.

The average rate on all classes of railroad property is determined by dividing the total 1957 railroad tax (p. 44) by the total assessed valuation of all classes, I, II and III. This yields an average tax rate of $42.94 per $1,000 valuation for all railroad property in 1957 in New Jersey.

* At p. 16a., Budget Message of Robert B. Meyner, Governor of New Jersey, for the Fiscal Year Ending June 30, 1959, it is said:

> "As a result of a Supreme Court decision in a recent railroad tax case, the Division has requested $725,000 to meet the estimated cost of an appraisal of all structures in railroad use. Such an appraisal was last made in 1911, thereby raising the question whether present-day assessments based on those valuations are equitable."

As a result, Class II railroad property assessed valuations in each year from 1940 to 1957 have not varied more than 5% from the mean assessments during said 18-year period. The high during the period was in 1947, at $188,527,405, and the low was in 1957, at $171,973,302. In 1940, at the start of this 18-year span, the assessed valuations were $177,594,315. (1957 Annual Report, Division of Taxation, p. 45.) Despite the increase in taxes on non-railroad property generally since 1935, the total railroad tax in New Jersey in 1957 was less than the total railroad tax in any years from 1935 to 1940. In 1938, for example, the total railroad tax in New Jersey exceeded $20,000,000. In 1957, however, the railroads paid a total of less than $17,300,000.[*]

Other preferential treatment of railroad property is given by the laws of New Jersey. N.J.S.A. 54:29A-10 exempts from taxation certain costs of "improvements, relocation, reconstruction, elimination or avoidance of highway grade crossings." And N.J.S.A. 54:29A-20 provides for a maximum assessment of $4500 per mile of track under certain conditions, regardless of the true value of such property.

Respondents deny that railroads are treated unfairly in the State tax scheme. Nevertheless, for the purposes of this argument only, petitioners' contentions shall be assumed as true, namely, that railroad property in New Jersey is assessed as a class at a higher proportion of true value than other property, and that no adequate remedy is afforded under State law. But before a remedy will be required by the Federal Constitution there must be a federal right to be redeemed. There is none here. The effective classification of railroad property for higher tax assessment purposes does not violate the Federal Constitution as interpreted in a long line of decisions of this Court.

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[*] See Annual Reports of the Division of Taxation, Department of the Treasury, State of New Jersey.

*Bell's Gap R.R.* v. *Pennsylvania*, 134 U. S. 232 (1890), sustained a Pennsylvania statute which taxed corporate indebtedness to the holder at face value but all other indebtedness at market value. This Court said, at 237, 238:

> "* * * We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation.* * *"
>
> "The general purpose and scope of the Fourteenth Amendment [is] * * * 'that no impediment should be interposed to the pursuits of anyone, except as applied to the same pursuits by others, under like circumstances; that no greater burdens should be laid upon one than upon others in the same calling and condition.'" (Quoting Mr. Justice FIELD in *Barbier* v. *Connolly*, 113 U. S. 27, 31.)

Applying this principle to railroads, this Court has very broadly held that it is reasonable for states to classify them for separate tax treatment. It has been specifically held that a state may provide different machinery for valuation of railroad property. *Cincinnati, N.O. and T.P. R.R.* v. *Kentucky* (Kentucky Railroad Tax Cases), 115 U. S. 321 (1885). The mode of valuation and distribution of value throughout the municipalities which a railroad traverses may be different. *State Railroad Tax Cases*, 92 U. S. 575 (1875). A state may tax railroads at a higher rate than other property, even higher than other public utilities. *Ohio Tax Cases*, 232 U. S. 576 (1914). The alleged difference in treatment by the taxing scheme of which petitioners complain has been consistently held by this Court not violative of rights arising from the equal protection clause.

That the separate treatment of railroad property may be the result of a state officer acting even in disregard of state statutes or constitutions is immaterial in determining whether a federal right has been violated. In *Missouri* v. *Dockery*, 191 U. S. 165 (1903), an individual taxpayer complained that a state administrative board valued for tax purposes railroads and certain other utilities at varying fractions of market value and did not assess express companies at all, contrary to the requirements of the state constitution and statutes that all property be assessed at true value. Justice HOLMES wrote for the court at 171:

> "[T]he question whether * * * or not [the state has wholly or partially exempted from taxation the companies enumerated above] is for the state courts to decide * * *. [I]f it has done so *de facto*, through its officers, the petitioner cannot come here * * *."

In *Snowden* v. *Hughes*, 321 U. S. 1, 11 (1944), this court said:

> "If the action of the Board is official action, it is subject to constitutional infirmity to the same but no greater extent than if the action were taken by the state legislature. Its illegality under the state statute can neither add to nor subtract from its constitutional validity. * * * And state action, even though illegal under state law, can be no more and no less constitutional under the Fourteenth Amendment than if it were sanctioned by the State Legislature."

These authorities make it clear that the discrimination alleged by petitioners gives rise to no greater rights under the equal protection clause than if the state law expressly provided for the result so achieved. The *Ohio Tax Cases*, *supra*, permitting taxation of railroads at higher rates, also support the principle that railroads may be assessed at higher values than other property, since the net effect of raising either the rate or the valuation is the same.

It is submitted that *Nashville C. & St. L. Ry.* v. *Browning*, 310 U. S. 362 (1940) is dispositive of the federal constitutional claim of petitioners herein. The opinion for a unanimous court was delivered by Mr. Justice FRANKFURTER.

The Nashville railroad sought "to review a judgment of the Supreme Court of Tennessee sustaining an assessment of (its) property, tangible and intangible, under that state's *ad valorem* tax law. All Tennessee property is subject to such a tax; but there are two schemes of procedure for making assessments, one for public service corporations and one for other taxpayers. As to ordinary property the task of valuation rests upon officials of the various counties. For public service corporations the assessments must be made by the Railroad and Public Utilities Commission, which is commanded to ascertain the 'actual cash value' of corporate property situated in Tennessee. Tennessee Code, §1526." At 363, 364.

The Tennessee Commission determined the railroad's assessment, and petitioner appealed to the State Board of Equalization in accordance with the local statute. After hearing, the Board confirmed the Commission's valuation.

In anticipation of a certification by the Board of its final assessment, petitioner started an action in the State courts, claiming violation of the State and Federal Constitutions. The trial court and the Supreme Court of Tennessee dismissed the action.

This Court first rejected petitioner's claim as to the violation of the commerce clause. Next, the Court considered petitioner's claim that it was the victim of systematic, state-wide discrimination. Petitioner contended that county assessors had systematically valued other property at far less than its true worth while railroad property had been assessed by the commission at full value. This practice, petitioner said, denied it equal protection of the laws. The issue was squarely raised in the State court and was rejected.

This Court then said:

> "But were we to take judicial notice of that (evidence of discrimination) which these minutes were offered to show, and therefore to regard the ground taken by the state court as a strained evasion of the differentiation between utility property on the one hand and all the rest on the other, we should still find no denial of the equal protection of the laws." at 367.

The court emphasized that the railroad did not complain of discrimination as against other members of its class.

> "Its asserted grievance is common to the whole class. We must put to one side therefore all those cases relied on by the petitioner which invoked the Fourteenth Amendment against discriminations invidious to a particular taxpayer." (cases cited) At 368.

The Court then said:

> "[S]o far as the Federal Constitution is concerned, a state can put railroad property into one pigeonhole and other property into another. * * * If the state supreme court had construed the requirement of uniformity in the Tennessee Constitution so as to permit recognition of these diversities, no appeal could successfully be made to the Fourteenth Amendment. * * * And if the state supreme court chooses to cover up under a formal veneer of uniformity the established system of differentiation between two classes of property, an exposure of the fiction is not enough to establish its unconstitutionality." At 369.

The Court held that although Tennessee may have arrived at separate treatment of railroad property by a circuitous or fictitious path, the Fourteenth Amendment was not violated.

Applying the principles set forth above, it is submitted that if the effect and application of the New Jersey laws, decisions and practices is such as to treat railroad property as a class differently than other property for tax purposes, no right under the Federal Constitution has been violated. The State may do by practice or indirection what it may unquestionably do directly and intentionally. Since there is no federal right to be vindicated this Court need not consider the adequacy of the remedy. Absent a right to be pursued no remedy need be afforded.

## CONCLUSION

**For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.**

Respectfully submitted,

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Dated: June 16, 1958.

# Appendix

**New Jersey statutes referred to in this brief in opposition, except for those statutes included in Appendix N and Appendix O of Petition.**

### 54:4-3.11. Exemption of Franchises; Railroad and Canal Property

All offices and franchises, and all property used for railroad and canal purposes, the taxation of which is provided for by any other law of this state, shall be exempt from taxation under this chapter.

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### 54:29A-2. Definitions

As used in this act,[1] unless the context clearly requires a different meaning:

"Railroad" means any common carrier by railroad engaged in, owning or constructing facilities for, the transportation of persons or property in or through this State, other than a street railway or traction company using or occupying the public streets, highways, roads or other public places, the taxation of which is otherwise provided by law.

"System" means any independently operating railroad which operates its facilities and those of one or more other railroads as a single utility for furnishing transportation service. A system shall include all companies the property of which is so operated either by virtue of control through direct or indirect ownership of a majority or more of capital stock, or under lease, trackage rights or under any other form of contract, and for which separate operating accounts are not maintained.

"Main stem" of a railroad means the roadbed not exceeding one hundred feet in width, as measured horizontally at the elevation of the base of the rail, including the full embankment or excavated area, with slopes, slope ditches, retaining walls or foundations necessary to provide a width not to exceed one hundred feet at base of rail, together with all tracks, appurtenances, ballast and all structures erected thereon and used in connection therewith, but not including passenger or freight buildings erected thereon.

"Tangible personal property" means the rolling stock, cars, locomotives, ferryboats, all machinery, tools and other tangible personal property of a railroad company, and also the locomotives and cars not belonging to such railroad company but built for its use and actually used in this State, or run under its control in this State by a sleeping car company or other company; but the rolling stock of other persons or corporations temporarily used on any such road, but not forming part of the equipment of such road, shall not be included in the term.

"Taxpayer" shall mean any person, railroad or system subject to taxation under the provisions of this act.

"Commissioner" or "State Tax Commissioner" means the director of the Division of Taxation in the State Department of Taxation and Finance. L. 1941, c. 291, p. 774, §2, as amended L. 1948, c. 40, p. 114, §2.

### 54:29A-10. Grade Crossing Improvements Exempt

The value of the main stem of each railroad and the other real estate thereof used for railroad purposes shall be ascertained without including any part of the cost of improvement, relocation, reconstruction, elimination or avoidance of the highway grade crossings, including State highways, made pursuant to Title 48 of the Revised Statutes, or pursuant to the provisions of an agreement for any of such purposes with a municipality made after April twenty-seventh, one thousand nine hundred and thirty-one, but such exemptions shall apply only to main lines and branches existing on April twenty-seventh, one thousand nine hundred and thirty-one. L. 1941, c. 291, p. 776, §10.

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### 54:29A-20. ASSESSMENT; CLASSES I AND III PROPERTY TAX; MAXIMUM AND MINIMUM PROPERTY AND FRANCHISE TAXES

(a) The valuations separately ascertained and determined for Classes I and III property shall be assessed by the commissioner, in the year one thousand nine hundred and forty-eight and each year thereafter, at the rate of one dollar and twenty cents ($1.20) per hundred dollars of assessed valuation, except as provided in subsection (b) of this section. The commissioner shall assess the tax on these classes of property to each system and railroad not part of a system on or before April tenth in each year.

(b) For the years one thousand nine hundred and forty-eight through and including one thousand nine hundred and fifty-one, the commissioner shall assess the tax upon Classes I and III property to each taxpayer at the respective rates indicated below, and shall credit against the tax so assessed the percentage indicated below of the amount (if any) of tax on Class II property assessed to each taxpayer:

| Year | Rate (dollars per hundred of valuation) for assessment of Class I and III valuations | Percentage of Class II tax assessed to be credited against the tax assessed on Classes I and III Property |
|---|---|---|
| 1948 | $2.05 | 18.00% |
| 1949 | 1.90 | 15.00 |
| 1950 | 1.70 | 10.00 |
| 1951 | 1.45 | 5.00 |

(c) If the total railway operating revenues of the preceding year of any taxpaper, allocated upon the all-track basis described in section fourteen hereof,[1] are not in excess of one million dollars ($1,000,000.00), then the aggregate amount of the franchise tax and property taxes otherwise imposed by this act[2] upon such taxpayer for the year one thousand nine hundred and forty-eight and each year thereafter shall not exceed three thousand dollars ($3,000.00) per mile of track included within its valuations under section seventeen hereof;[3] *provided, however,* that the foregoing limitation shall not reduce the tax herein levied upon Class II property, but shall be applicable to reduce the other taxes herein imposed, in the following order: first, the tax upon Class III property; secondly, the tax upon Class I property; and, lastly, the franchise tax, but the latter tax shall never be less than one hundred dollars ($100.00).

If the total railway operating revenues of the preceding year of any taxpayer, allocated upon the all-track basis described in section fourteen hereof, are in excess of one million dollars ($1,000,000.00), but such allocated revenues are less than fifty thousand dollars ($50,000.00) per mile of all track over which the taxpayer operates in this State, then the aggregate amount of the franchise tax and property taxes otherwise imposed by the act upon such taxpayer for the year one thousand nine hundred and forty-eight and each year thereafter shall not exceed four thousand five hundred dollars ($4,500.00) per mile of track included within its valuations under section seventeen hereof; *provided, however,* that the foregoing limitation shall not reduce the tax herein levied upon Class II property, but shall be applicable to reduce the other taxes herein imposed, in the following order: first, the tax upon Class III property; secondly, the tax upon Class I property; and, lastly, the franchise tax, but the latter tax shall never be less than four thousand dollars ($4,000.00). L. 1941, c. 291, p. 780, §20 as amended L. 1942, c. 337, p. 1190, §4; L. 1948, c. 40,[4] p. 120, §11.